VOLUME 3

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1966

No. 8

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL., APPELLANTS,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

No. 23

UNITED STATES, ET AL., APPELLANTS,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

NO. 8—FILED MAY 20, 1965

NO. 23—FILED SEPTEMBER 15, 1965

PROBABLE JURISDICTION NOTED APRIL 4, 1966

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APPENDIX A

REDUCTION OF RAILROAD PASSENGER TRAIN SERVICE OTHER THAN COMMUTATION IN MOUNTAIN-PACIFIC TERRITORY
1950 through 1960

	MOUNTAIN-PACIFIC STATES										TOTAL Mountain-Pacific Territory
	Arizona	California	Colorado	Idaho	Montana	Nevada	New Mexico	Oregon	Utah	Washington	Wyoming	
Number of Passenger Train Discontinuances In The State of:												
Approved	5	18	20	13	18	3	6	1	4	2	7	97
Denied	2	6	3	0	2	0	1	0	0	0	0	14
Pending	0	2	0	0	2	0	0	1	1	0	0	6
*Other	0	16	0	0	0	2	8	10	2	26	2	66
TOTAL	7	42	23	13	22	5	15	12	7	28	9	183
Number of Main Line Passenger Trains Discontinued in the State	7	62	31	10	24	2	12	6	10	26	18	208
Number of Branch Line Passenger Trains Discontinued in the State	2	6	10	16	18	4	12	10	2	30	0	110
Total Number of Passenger Trains Discontinued	9	68	41	26	42	6	24	16	12	56	18	318
Number of Track Miles in Passenger Train Service Discontinued												
Main Line	314	497	1,800	321	249	46	1,056	407	37	89	797	5,613
Branch Line	38	177	456	512	598	174	570	457	14	925	0	3,921
TOTAL	352	674	2,256	833	847	220	1,626	864	51	1,014	797	9,534

* Includes Discontinuances automatically effective for lack of state jurisdiction or because of lack of public protests, no hearing was held or order issued.

Source: Official Records of the State Regulatory Commissions of Mountain-Pacific Territory.

[fol. 996]

APPENDIX "F"

PASSENGER TRAFFIC AND REVENUES - CLASS I RAILROADS

	1948	1949	1950	1951	1952	1953	1954	1955	1956	1957	1958	1959	Reduction 1959 vs. 1948 Amount	Reduction 1959 vs. 1948 Percent
Miles of Road Operated - Passenger Service														
United States	159,732	156,898	150,349	139,269	133,097	129,048	124,743	119,745	116,048	112,724	107,118	100,252	59,480	37
Eastern District	33,867	33,431	32,403	29,719	28,891	28,068	27,246	25,351	24,490	23,747	22,496	20,512	13,355	39
Western District	88,811	87,105	84,108	80,211	76,621	74,622	72,682	70,529	68,532	66,939	63,299	59,676	29,135	33
Passenger Train Miles Operated (Thousands of Miles)														
United States	407,209	380,307	357,618	356,322	345,528	334,057	318,090	299,550	290,853	275,766	247,332	225,866	181,343	45
Eastern District	165,930	151,905	139,652	139,507	136,090	130,164	123,685	119,670	115,958	108,534	94,598	83,830	82,100	49
Western District	169,199	161,416	156,437	154,879	149,836	147,132	140,353	130,805	126,455	120,284	109,629	102,583	66,616	39
Number of Revenue Passengers Carried (Millions of Passengers)														
Commutation Service - United States	332	309	278	269	260	256	250	248	247	249	240	221	111	33
Commutation Service - Eastern District	245	229	201	193	185	183	181	178	178	175	168	155	90	37
Commutation Service - Western District	44	42	41	41	42	41	42	43	43	49	48	46	+ 2	+ 5
Coach Service - United States	284	223	186	189	186	181	172	167	165	149	129	122	162	57
Coach Service - Eastern District	212	164	137	138	135	133	127	122	121	112	96	89	123	39
Coach Service - Western District	44	37½	31½	33	34	32½	31	31½	31½	25	23	22½	21½	49
Parlor and Sleeping Car Service - United States	28	23	22½	25	23	20	18	16½	16	13½	10½	9	19	68
Parlor and Sleeping Car Service - Eastern District	14	11½	11	11	11	10	9	8½	8	6½	5	4	10	71
Parlor and Sleeping Car Service - Western District	8½	7	7	8	7	6½	5½	5	4½	3½	3	3	5½	65
TOTAL - United States	643	554	486	484	469	457	439	431	429	411	379	352	291	45
TOTAL - Eastern District	469	404	349	342	331	326	316	308	307	294	270	248	221	47
TOTAL - Western District	97	86	80	83	83	80	79	79	79	78	74	71	26	27
Average Miles Per Passenger Per Road														
Commutation Traffic - United States	17.6	17.9	18.0	18.1	18.3	18.6	19.0	19.3	19.9	19.9	20.0	20.5	+ 2.6	+ 15
Commutation Traffic - Eastern District	18.9	19.0	19.2	19.3	19.5	19.8	20.1	20.3	20.7	20.8	21.0	21.5	+ 2.6	+ 14
Commutation Traffic - Western District	17.9	17.9	18.1	18.4	18.3	18.7	19.1	19.3	20.4	20.0	19.4	19.7	+ 1.8	+ 10
Coach Traffic - United States	85.9	91.0	93.9	103.1	106.1	104.8	103.0	103.4	103.3	103.1	110.1	112.9	+27.0	+ 31
Coach Traffic - Eastern District	55.5	57.9	58.3	63.0	63.5	62.0	60.4	60.1	59.7	59.3	58.9	57.7	+ 2.2	+ 4
Coach Traffic - Western District	189.7	196.0	206.2	224.5	230.3	235.0	232.4	227.8	227.6	224.0	278.9	287.2	+97.5	+ 51
Parlor and Sleeping Car Traffic - United States	399.9	403.7	411.3	410.2	417.4	395.8	384.0	383.7	386.0	390.0	400.8	413.4	+13.5	+ 3
Parlor and Sleeping Car Traffic - Eastern District	304.8	305.9	311.1	311.3	313.2	308.6	306.1	306.2	308.3	307.7	311.4	313.7	+ 8.9	+ 3
Parlor and Sleeping Car Traffic - Western District	606.0	606.3	610.0	609.8	622.2	566.9	543.5	546.7	560.2	574.7	584.4	597.2	8.8	1½

[fol. 997]

APPENDIX "B" (Cont'd)

From		1948	1949	1950	1951	1952	1953	1954	1955	1956	1957	1958	1959	Reduction Since 1948 Amount	Reduction Since 1948 Percent
		Passenger Revenue (Millions of Dollars)													
Commutation Service	United States	$ 76	$ 78½	$ 79	$ 83	$ 89	$ 93	$ 96	$ 101	$ 107	$ 116	$ 123	$ 124	+ 48	+ 63
	Eastern District	59	61⅝	62	65	70	71	73	77	83	88	95	93	+ 34	+ 58
	Western District	10	10	10	11	12	13	14	15	16	19	20	22	+ 12	+ 120
Coach Service	United States	556	488	431	483	499	480	442	428	437	429	392	381	175	31
	Eastern District	296	262	234	254	255	245	226	217	221½	218	193	182	114	39
	Western District	170	148	131	154	165	160	148	146	150	146	140	142	28	16
Parlor and Sleeping Cars	United States	332	294	303	334	318	269	229	213½	213	191	159	145	187	56
	Eastern District	140	129	133	142	139	122	108	101⅝	102	91	75	67	73	52
	Western District	139	117	121	135	126	102	84	76	73	63	55	51	88	63
Total Passenger Revenues	United States	964	861	813	900	906	842	767	743	756	735	675	651	313	32
	Eastern District	495	453	430	461	439	464	408	397	406	398	364	342	153	31
	Western District	319	275	262	300	304	275	247	237	239	228	215	215	104	33

Source: Interstate Commerce Commission, Bureau of Transport Economics & Statistics

Statement No. M-220 - Revenue Traffic Statistics of Class I Railroads in the United States
Statement No. M-250 - Passenger Traffic Statistics of Class I Railroads in the United States

Statistics of Railways in the United States

[fol. 998]

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Transcontinental Divisions Cases

No. 31503*

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, et al., Complainants,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., Defendants.

REPLY OF MIDWESTERN COMPLAINANTS TO EXCEPTIONS OF OPPOSING PARTIES

Volume I

John W. Adams, Jr., Nuel D. Belnap, Martin L. Cassell, Charles H. Clay, Richard M. Freeman, Bryce L. Hamilton, George W. Holmes, John E. McCullough, Nye F. Morehouse, William A. Thie, Erle J. Zoll, Jr., Attorneys for Midwestern Complainants.

Due date: May 29, 1961.

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* This reply also embraces The Ahnapee and Western Ry. Co., et al. v. Abilene & Southern Ry. Co., et al., Sub-No. 1; Chicago, Burlington & Quincy RR. Co., et al. v. Abilene & Southern Ry. Co., et al., Sub-No. 2; Chicago, Milwaukee, St. Paul and Pacific RR. Co. v. Abilene & Southern Ry. Co., et al., Sub-No. 3; Louisville and Nashville RR. Co. v. The Akron, Canton & Youngstown RR. Co., et al., Sub-No. 4; and The Cincinnati, New Orleans and Texas Pacific Ry. Co., et al. v. The Akron, Canton & Youngstown RR. Co., et al., Sub-No. 5.

[fol. 999] The record in these proceedings is without doubt more comprehensive and informative than any record which the Commission has heretofore had before it in any interterritorial divisions case. In the words of Transcontinental counsel, "the contesting parties compiled the large exhaustive record which they believed necessary to a proper determination of the issues under the standards of Section 15(6) of the Act and the precedents of the Commission and the courts." (Defs' Exceptions 2)

* * * * * * *

[fol. 1000] The showing of the present divisions, the mileages and routes appertaining thereto, and the divisions under formulas used for comparison embraces literally many thousands of divisions. (MW-64-74; MW-75; MW-101; MW-189-99; MW-205-11; MW-213-16; MW Brief, Apps. II-A, II-B, II-E; MW Exceptions, Apps. 3-4) The suggestion of Defendants that the record in these proceedings does not conform to the rule of the *Abilene* case is not embodied in a specific exception, and is wholly without foundation.

* * * * * * *

[fol. 1001] The important question here is not the range or amount of the percentages of increase or reduction recommended by the Examiners for the several groups of carriers, but whether the Examiners have recommended divisions which are just, reasonable, and equitable. In a divisions case the objective of the Commission is "to establish a basis of divisions in line with the evidence, whatever the revenue results might prove to be." *Divisions of Freight Rates,* 156 I.C.C. 94, 95. When the Commission increases the divisions of one group of carriers and reduces the divisions of another group by considering and weighing the evidence in the light of the standards of Section 15(6) of the Act, the percentages of increases and reduction, whether large or small, measure the amount by which the divisions of the one group are inadequate and the divisions of the other group are excessive.

* * * * * * *

[fol. 1002]

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Transcontinental Divisions Cases

No. 31503 and Sub Nos.

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY et al.,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY et al.

REPLY OF MOUNTAIN-PACIFIC RAILROADS TO EXCEPTIONS OF OFFICIAL LINES AND MIDWESTERN LINES (INCLUDING T&P)

S. R. Brittingham, Jr., R. Granville Curry, Frank S. Farrell, Lawrence W. Hobbs, Thormund A. Miller, Ernest Porter, Howard V. Rhedin, L. E. Torinus, Jr., E. L. Van Dellen, Howard J. Trienens, Douglas F. Smith, Counsel for the Mountain-Pacific Railroads.

Due Date: May 29, 1961.

* * * * * * *

[fol. 1003]

E. Request for Prescription of Divisions of Utah Gateways.

The Midwestern lines ask that the Commission fix divisions over Utah gateways, not served by any Midwestern line, in the interest of equalizing competing routes (MW Exc., pp. 106-113). In dealing with this contention, two considerations must be sharply differentiated. The first is the general desirability of equalizing divisions; the Mountain-Pacific lines agree that the parties should be free to equalize divisions over competitive routes (Exhibit T-302,

p. 20). But a very different question is raised when the Midwestern lines ask the Commission to prescribe divisions over gateways 500 miles inside Mountain-Pacific territory and served only by Mountain-Pacific lines. Such a prescription is beyond the issues of the complaints before the Commission in this proceeding.

The complaint of the Midwestern lines (Docket 31503 Sub No. 1) describes the territories between which the joint rates apply. "Midwestern Territory" is defined by listing the states or portions of states included therein. No part of Utah is included in "Midwestern Territory". Colorado west of Denver, and New Mexico west of Tucumcari, are expressly excluded from "Midwestern Territory" under the Midwestern lines' complaint.*

Having so defined the territories, the Midwestern lines then define the divisions which their complaint brings in issue as follows (paragraph 6):

> "The present divisions of the joint rates described in [fol. 1004] paragraph 3 hereof do not conform to the standards set forth in the Interstate Commerce Act in that (a) the proportions from the joint rates between Eastern Territory and Transcontinental Territory received by the complainants are, and for the future will be, unjust, unreasonable, inequitable, and unduly prejudicial *as to complainants,* and unduly preferential as to the carriers in Eastern Territory and *as to the carriers west of Midwestern Territory;* and (b) the proportions from the joint rates between Midwestern

---

* In defining "Midwestern Territory", the complaint in Docket 31503 Sub No. 1, provides (Appx. D):

> "Colorado (except stations on and west of the line of Union Pacific Railroad Company from Cheyenne, Wyo., thru Greeley and Brighton to Denver, thence line of The Colorado and Southern Railway Company thru Colorado Springs, Pueblo, Walsenburg and Trinidad to New Mexico border).
>
> * * * * * * *
>
> "New Mexico (stations on lines of Chicago Rock Island and Pacific Railroad Company east of Tucumcari)."

> Territory and Transcontinental Territory received by complainants are; and for the future will be, unjust, unreasonable, inequitable, and unduly prejudicial *as to complainants,* and unduly preferential *as to the carriers west of Midwestern Territory.*"

The Rock Island, for example, thus complains that the divisions which it receives (for hauls between Chicago and Denver, or between Chicago and Tucumcari) are unfair to the Rock Island and preferential as to the carriers west of Denver and Tucumcari.*

Thus, it is plain that the pleadings in this proceeding do not bring into issue the divisions over Utah gateways. Consistent with the pleadings, there is no evidence comparing conditions east and west of Utah gateways.** Accordingly, there is no basis under the pleadings or the record in these proceedings for a prescription of divisions between Mountain-Pacific lines serving gateways in the middle of Mountain-Pacific territory (Exhibit T-303, p. 13).

The Midwestern lines' proposal for a complex series of multiple breaking points, including breaks at Utah gateways and other points far removed from the territorial borders, is justified in their Exceptions on the ground of competitive equalization (MW Exc., pp. 112-116). The fact is, as the Midwestern lines themselves admitted, that their proposal does not equalize competitive routes since they

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* The only other operative paragraph of the complaint deals with competitive divisions, "received by defendant carriers *operating in Midwestern Territory*"; no reference was made to the divisions over Utah gateways, served exclusively by carriers in Mountain-Pacific Territory (Complaint in Sub. No. 1, par. 7).

** The evidence presented by the Midwestern lines' cost witness never purported to compare costs over Utah gateways or the other breaking points proposed by the Midwestern lines. No effort was made by the Midwestern lines' witness who presented their proposal to reconcile the proposed breaking points with the separations made by their cost witness (Tr. 9745-9746), or to correlate any of the features of the proposal with their cost evidence (Tr. 2833-2834).

requested that carriers be left free to modify the divisions produced by their proposal in order to equalize divisions (Exhibit MW-139, pp. 22-23).

[fol. 1005] What the Midwestern lines' complex breaking point proposal is designed to do is to pyramid the advantage to the Midwestern lines of the distortion in their proposed use of divisional integer scales based on rate scales. Generally, the Midwestern and Eastern lines are the short haul carriers and the Mountain-Pacific lines are the long haul carriers of transcontinental traffic. But even on such shipments on which the Midwestern lines have a long haul (the Rock Island from Chicago to Tucumcari on Phoenix traffic, for example), the proposed multiple breaks, including breaks in the middle of Midwestern territory, would artificially separate the long Midwestern haul into two short hauls. This mechanical feature of the Midwestern lines' proposal would thus operate to compound to the advantage of the Midwestern lines the unearned premium inherent in the divisional scales based on the rate scale progression which they propose. (Exhibit T-303, pp. 9-13).

Any legitimate concern the Midwestern lines may have in any threat to the equalization of divisions over Utah gateways is premature. If any problems arise as to equalization of divisions over those gateways on a fair and equitable basis, they can be considered in the negotiations contemplated in the Recommended Report. If agreement can be reached as to any equalization involving divisions not here in issue, any related modification of the prescribed divisions to conform to the agreed equalization can be requested by joint petition.

* * * * * * *

[fol. 1006]

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Transcontinental Divisions Cases

Docket No. 31503 and Sub Nos.

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY et al.,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY et al.

PETITION FOR RECONSIDERATION OF THE COMMISSION'S ORDER DATED MARCH 21, 1963

S. R. Brittingham, Jr., R. Granville Curry, Frank S. Farrell, Lawrence W. Hobbs, Thormund A. Miller, Ernest Porter, Howard V. Rhedin, Howard E. Roos, L. E. Torinus, Jr., E. L. Van Dellen, George L. Saunders, Jr., Howard J. Trienens, Douglas F. Smith, Counsel for Mountain-Pacific Carriers.

Due Date: July 26, 1963.

* * * * * * *

[fol. 1007]

Introductory Statement

The transcontinental divisions prescribed in the Commission's order dated March 21, 1963, would radically reduce the revenues upon which the Mountain-Pacific carriers depend for their existence. The direct and simultaneous impact of extreme and excessive increases in the Eastern lines' percentage divisions, coupled with new mileage scales which increase the important divisions of the Midwestern lines, impose upon the small group of Mountain-Pacific

lines a revenue loss which is undoubtedly far greater than that ever imposed upon any group of lines at any time in the history of the Interstate Commerce Commission.

A most extraordinary feature of the Commission's action is that drastic reductions in the divisions of the Mountain-Pacific lines are prescribed on the express ground of relative revenue needs but without making any of the findings of fact that are, as a matter of law and of logic, indispensable to such action. Specifically, the report and order would require a transfer of divisional revenues on the ground of revenue needs without finding:

(1) the amount of revenue which the order would transfer;

(2) that such a transfer is necessary to meet the fair proportion of the complainant carriers' revenue need that should be met from the traffic at issue; or

(3) that such a transfer can be borne by the defendant carriers in light of their own need for revenues to serve Mountain-Pacific territory.

For the Commission to prescribe a transfer of divisional revenues on the ground of revenue needs without finding and, for all that appears, without knowing these facts constitutes not the exercise of reasoned administrative judgment but an unlawful stab in the dark.

This broad and basic error of the Commission is compounded by the nature of the divisions prescribed.

Appendix B to the report sets forth entirely new group percentages for the Eastern lines which are far higher than their present divisions or even the divisions recommended by the Commission's Examiners. We are told that the new percentage for the Eastern lines on traffic between Pittsburgh and the Pacific Coast via Chicago is to be 22 [fol. 1008] percent. Where does this percentage come from? We are told that this represents an increase of 33 per cent over the Eastern lines' present divisions (sheet 79).* Why

* References by sheet number are to the sheets of the Commission's report dated March 21, 1963.

an increase of 33 percent on Pittsburgh traffic and an increase of 24 percent on New England-Seaboard traffic (sheet 79)? With one lone exception, the report fails to relate any of the percentages prescribed over eastern gateways to mileage, to costs, to revenue needs, or to anything.* The percentages might as well come out of thin air for all that appears in the report.

It is demonstrable that the percentages prescribed for the Pittsburgh Group and the Detroit-Indianapolis group are wholly disproportionate and excessive even in relation to the other percentages prescribed in Appendix B of the report. We shall show that these divisions reflect mileages to the extreme end of these groups, not to any point representing the average haul of traffic to the group. These particular percentages must be reduced whatever view one takes as to the eastern divisions as a whole.

More broadly, the failure to provide any rational explanation or foundation for the divisions prescribed condemns the report and order as unlawful under the Administrative Procedure Act.

The divisions prescribed over midwestern gateways represent even more radical departures from the present basis of transcontinental divisions and, indeed, from the divisions recommended by the Commission's Examiners. New mileage scales, applied in a completely new manner, are prescribed in Appendix C of the report without any rational explanation of their derivation, without any showing of the effect that the prescribed divisions will have on any of the present divisions, and without any recognition or appreciation of the effect that these new divisions will have in disrupting the routing of traffic to the severe injury of individual railroads.

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* The one instance in which the report undertakes to explain the basis for any percentage prescribed in Appendix B is the statement relating to the use of a 15 percent minimum (sheet 81). As we shall show (p. 159 *infra*), the explanation given, namely terminal costs, could not justify a minimum division in excess of 7 per cent for the transcontinental hauls here at issue under the cost evidence most favorable to the Eastern lines.

There is no correlation whatever between the divisions prescribed and the discussion in the report of costs and revenue needs. And, in the discussion of revenue needs, [fol. 1009] there is no rational explanation of the treatment or grouping of the carrier earnings data, the disregard of the actual earnings experience of the Mountain-Pacific roads, or the reliance upon unreal passenger deficit statistics without any hearing as to the nature and effect of these statistics which played no part in these proceedings. No effort whatever is made to relate the discussion of revenue needs to the standards of Section 15(6) of the Act or to the Commission's different administration of the Act prior to this transcontinental divisions proceeding.

In the discussion of costs, the report contains an analysis of certain features of the Mountain-Pacific lines' cost study. Since the Examiners did not purport to make findings as to that study, and indeed disclaimed any such undertaking, this Petition for Reconsideration affords the first opportunity to take exception to these criticisms of the cost study. We shall deal explicitly with each of the six areas of criticism in the confident expectation that the Commission will fully and fairly consider our exceptions to these criticisms and find, upon such reconsideration, that each of the specific criticisms is unfounded. We shall also show that the "Restatement" of costs which purports to correct the study to allow for the six criticisms grossly understates the relative costs of the Mountain-Pacific lines, not only because the six criticisms are unfounded but because the "Restatement" cannot be reconciled with the record and understates the Mountain-Pacific lines' costs even if the six substitutions could properly be made.

The report deals with the cost issues in total disregard of the physical facts which compel the movement of transcontinental traffic over a series of mountain ranges in Mountain-Pacific territory as contrasted with the low-cost bridge service across the Midwest and the movement in the portion of the East where the terrain is level. None of the physical effects of mountain vs. plains operations on

track maintenance, or on locomotive costs, for example, are even mentioned in the report, much less evaluated with reasoned findings. None of the physical facts as to the handling and distribution of transcontinental traffic is reflected in the discussion of empty return ratios or car costs, for example. Nor is the effect of the difference in proportions of transcontinental traffic to total system traffic in the respective territories ever evaluated in making the six criticisms or, most significantly, in leaping from each criticism to the use of territorial average costs. As we shall show, [fol. 1010] even if the criticisms of the Mountain-Pacific lines' cost study were valid, they would *not* justify substitution of territorial average cost data which are demonstrably inapplicable to transcontinental traffic.

These errors in the treatment of costs arise from the unfair and unlawful standard of proof invoked in the report. As the report prescribes increased divisions for the complainant Eastern and Midwestern roads, the burden of supporting such a change in the divisions is obviously upon complainants. Reinforcing this burden on complainants under the law is the practical fact that the data showing the actual costs of the Eastern and Midwestern roads in handling the transcontinental traffic are in the possession of those lines. Under these circumstances, the report is unlawful in imposing upon defendant Mountain-Pacific lines the burden of establishing the actual costs of the Midwestern and Eastern roads. Even if the costs developed for those two groups of roads in the Mountain-Pacific lines' cost study are subject to criticism, which we deny, the burden is on complainants to prove their actual costs.

These and other important deficiencies in the report and order of the Commission will be set forth in necessary detail in the separate sections which follow in this Petition for Reconsideration.

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[fol. 1011]

(4) The Refusal to Receive in Evidence the Working Papers Underlying the Mountain-Pacific Lines' Cost Study.

A number of deficiencies in the report arise from the absence from the record of sufficient detail concerning the Mountain-Pacific lines' cost study and the traffic sample underlying that study. These deficiencies include the following:

Lack of a basis for correct restatement of the cost studies to reflect the six substitutions stated in the report (see pp. 84-85, *supra*).

Lack of detailed facts as the basis for applying alternative costs that satisfy the Commission's criticisms without resort to territorial averages (referred to at pp. 33, 54, 65-66, 75, 79, and 82, *supra*).

Lack of data as to individual movements of traffic moving between the groups prescribed in the order (discussed at pp. 134-136, *infra*).

These deficiencies in the record are the result of the Commission's action affirming the Examiners' rejection of the working papers underlying the Mountain-Pacific lines' study.

The detailed underlying facts contained in the working papers were regarded as essential by the parties and were also considered by the parties as being essential to any proper review of the cost evidence by the Commission's Cost Finding Section. The working papers of each of the parties had been made available to the other parties, and basic working papers were also filed with the Cost Finding Section by the Eastern and Midwestern lines as well as by the Mountain-Pacific lines during the course of the proceedings (Tr. 9623-9624, 9626, 9786, 9878).

The cost exhibits summarized from working papers were presented by witnesses who were cross-examined at length

in light of the working papers (e.g., Tr. 9242). In rebuttal, our opponents presented in evidence such fragments of the working papers as they desired to discuss (e.g., Exhibit MW-762, Appx. G). In order that the Commission might have access to all of the working papers (which were already on file with its Cost Finding Section), we offered to stipulate that the working papers be made a formal part of the record (Tr. 9623-9624):

> "Mountain Pacific Lines ask the parties to consider [fol. 1012] joining in the stipulation that all of the work papers associated with and underlying their respective cost exhibits and testimony herein may be made and considered for all purposes a part of the record herein on the following grounds:
>
> "1. The work papers so identified show the detail of the computations and procedures underlying the exhibits of record and assist in the full analysis and understanding of the exhibits and testimony with which they are associated.
>
> "2. The parties have controverted the measure of certain of the Mountain Pacific Line adjustments in their rail form "A" study, but it would not be feasible or useful to reflect in the overall cost the effect of every alternative adjustment and combination of component elements of such study. By means of the work papers now proposed to be stipulated in evidence together with the exhibits and testimony already of record, the effect of any proposed alternative adjustment may be computed.
>
> "In accordance with the long custom in such proceedings adhered to by all of the parties, the parties have from time to time furnished all of such work papers to be covered by the stipulation to all parties and to the Commission's Cost Finding Section.
>
> "It seems proper to say that we think it so clear that all such work papers must be brought into the record herein, that failing a stipulation to that effect we would

feel obliged formally to offer our own work papers in evidence. I wanted to bring that to your attention in view of the Examiner's statement that no further evidence would be offered. I would offer it this morning if it is clear that it can't be stipulated. However, we think the parties should be able to agree on the matter and we submit it for your consideration. Will you kindly counsel on the subject and advise at your convenience?"

Upon the refusal of the Eastern and Midwestern lines to stipulate, the working papers were formally offered in evidence (Tr. 10,032-10,034). The Examiners refused to receive the exhibit and refused even to mark the tendered exhibit or its index, despite the express provisions of Rule 1.84(e) of the Commission's General Rules of Practice (Tr. 10,044-10,046).

The Examiners adhered to their ruling rejecting the cost study working papers (Ex. Rept., sheet 14 and Appx. C), but the reasons given were not addressed to the special problems presented by the working papers underlying the cost testimony of record, tested by cross-examination and [fol. 1013] in the possession of the parties and the Cost Finding Section. These points were specifically raised in Exceptions to the Examiners' report, as was the error in refusing even to mark the Exhibit as required by Rule 1.84(e) (Exceptions of M-P lines, p. 143). The Commission's report does not respond at all to the points made in these exceptions, but simply affirms the Examiners' ruling (sheet 25).

This treatment of the working papers is erroneous in failing to state any rational basis for excluding the working papers. The error in refusing to receive the working papers has led to the making of numerous other errors, previously referred to, because the detailed information contained in the working papers is not in the record. The most serious of these errors is the absence of any evidence which permits a derivation from the record of the revenue

effect upon the railroad groups or upon the individual railroads of the divisions prescribed by the Commission.*

Because of the omissions of traffic and the change in the definition of the Mountain-Pacific border, the record does not show the relative hauls of the Midwestern and Mountain-Pacific carriers and thus does not measure the extent to which the unlawful construction of the 29886 divisional integer scale prescribed prejudices the long-haul Mountain-Pacific carriers. Such information as to the relative hauls and the revenue effect of differently constructed scales could have been determined if the working papers underlying the Mountain-Pacific lines' cost and related traffic study had been received in evidence.

Nor does the record permit any rational analysis of the specific percentages for the separate Eastern divisions group, which percentages must have been, as the record now stands, drawn out of thin air. In connection with the restatement of costs in the report, the absence of the working papers precluded a correct and meaningful restatement of the cost study even if the six "criticisms" of that study were justified. This same deficiency in the record prevented a fair appraisal of the "criticisms" to produce unit costs consistent with such criticisms, if justified, without resort-
[fol. 1014] ing to completely unadjusted territorial average costs.

Under these circumstances, the refusal to receive in evidence the cost study working papers, coupled with the Commission's treatment of the issues in the absence of necessary cost and traffic information, has deprived the Mountain-Pacific lines of a fair hearing.

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* The Eastern lines so conceded when they found themselves obliged to use the working papers underlying the Mountain-Pacific lines' cost study in calculating the revenue effect of the Examiners' recommended order (Exceptions of Eastern lines, p. 46 and Appx. E). (This calculation was subject to the further deficiency of failing to show in any adequate detail the nature of the application of the recommended divisions so that the calculations could have been checked if the working papers had been in the record.)

[fol. 1015]

II

Revenue Needs

* * * * * * *

A. The Inadequacy of the Findings to Meet the Statutory Standard of Revenue Needs.

The Administrative Procedure Act, fully applicable to proceedings before this Commission, specifically provides (5 U.S.C. § 1007(b):

> "All decisions . . . shall . . . include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record . . . "

Where the Commission undertakes to base a change in divisions on the ground of "revenue need," it is axiomatic that the Commission must: (1) find the amount of revenue which its order would transfer; (2) find that such a transfer is necessary to meet the fair proportion of the complainant carriers' revenue need that should be met from the traffic at issue; and (3) find that the transfer will not unduly impair the defendant carriers' ability to meet their own revenue needs. None of these findings are made in the report in this case. The report does not even find the overall revenue effect of its order much less its effect on individual roads. The report of one dissenting Commissioner refers to "estimates" of revenue effect (sheet 89) but the source and nature of such "estimates" is not revealed. Nor is any reason given why such findings, traditionally made in other divisions cases in which the revenue need basis has been invoked (e.g., *New England Divisions,* 66 I.C.C. 196, 206, affirmed 261 U.S. 184 (1922)), have not been made in the present case.

Such findings are essential before the Commission can [fol. 1016] rationally apply a revenue needs theory in transferring divisional revenues, whatever the meaning of the term "revenue needs."

A separate deficiency in the report is the reliance upon an unlawful definition of "revenue needs." The Act does not sanction the mere equalization or socialization of earnings and returns to the owners of different railroad properties through a transfer of divisional revenues. Differences in "revenue needs" justify a change in divisions only if such a change is required, in the public interest, to maintain carriers "in effective operations as part of an adequate transportation system." *New England Divisions,* 261 U.S. 184 (1922); *United States* v. *Abilene & So. Ry. Co.,* 265 U.S. 274, 280-285 (1924); *United States* v. *Great Northern R. Co.,* 343 U.S. 562, 575-576 (1951).

The report gives only lip service to this test. The report states that the divisions of the Eastern roads should be increased because of revenue needs "under the requirement of the public interest that all essential parts of the transportation system be maintained, so far as possible, in effective working condition (*New England Divisions, supra*)." However, this statement of ultimate conclusion does not rest upon any findings identifying any respects in which any part of the transportation system is jeopardized or requires additional revenue to maintain it in effective working condition. Instead, the report makes it plain that it has departed from the lawful test by equating "revenue needs" with mere "differences in earning power" (sheet 77) based upon an earlier conclusion "that the eastern railroads are in a *less advantageous situation* as freight carriers than those in the western district" (sheet 67) (Emphasis supplied).

Never before has the Commission undertaken to transfer revenue on the basis of revenue needs merely because it found a difference in earning power. On the contrary, in the last transcontinental divisions case, Docket 15234, the Commission did not disturb the existing divisions although it expressly found a "superiority of earning power on the part of the transcontinental lines as a whole" (203 I.C.C. at 328).

Accordingly, the whole premise of the discussion of revenue needs that a transfer of divisional revenues can be based upon differences in earning power is without precedent before the Commission and in violation of the revenue needs standard enforced by the Courts.

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[fol. 1017]

C. The Unlawful, Unprecedented and Irrational "Passenger Deficit"-"Freight Carrier" Concept

As the basis for disregarding the actual earning experience of the carriers, the report relies upon "Passenger Deficits" and "Net railway operating income-freight service" (sheets 62-69).

(1) The Lack of Reality in the Use of Passenger Deficits in the Report.

In disregarding the actual earnings of the carriers and thus penalizing the Mountain-Pacific roads by basing its conclusion on earnings as "freight carriers," the report attaches a significance to the passenger deficit statistics that is entirely unreal.

Nowhere does the report explain the nature and meaning of the passenger deficit statistics upon which it relies. Nor does the Commission make any findings or articulate any explanation rationalizing its very different treatment of passenger revenues and expenses in train discontinuance cases.

In the absence of any findings supporting the reality of the passenger deficit statistics as measuring real deficits that could in fact be eliminated, the report is woefully deficient in relying upon such statistics as the basis for dismissing the proven "deprivations" suffered by the owners of the Mountain-Pacific railroads (sheet 66).

(2) The Unlawfulness of the Reliance Upon Earnings "as Freight Carriers" Even if the Separation Between Freight and Passenger Services Had Reality.

The lack of reality in basing a report on "passenger deficit" and "freight net railway operating income" figures which are the result of a statistical apportionment of common expenses between passenger and freight services is but one of the vices in the revenue needs conclusions of the [fol. 1018] report. Those conclusions, based upon "freight earnings" (sheet 76) and the revenue need situation of the various groups of railroads "as freight carriers" (sheet 67), are also unlawful even if it were assumed that the statistical separation that produces the "freight net railway operating income" produces real and meaningful data.

The report never explains why, in dealing with the "revenue needs" of the carriers, it bases its conclusions on their situation "as freight carriers" and not their revenue need as carriers. The portion of Section 15(6) that permits the Commission to rely upon revenue needs in prescribing divisions provides that the Commission shall rely upon "the amount of revenue required to pay their [the carriers'] respective operating expenses, taxes and a fair return on their railway property held for and used in the service of transportation" (49 U.S.C. § 15(6)). The statutory mandate to take account of revenue need specifically embraces the revenue need of the carrier on all of its railway property, not the freight portion. If a carrier is in need of additional revenue to maintain it, in the public interest, as a part of the transportation system, the relevant fact is that the carrier needs additional revenue, not that it needs revenues "as a freight carrier." To the extent that revenue need is a factor in this transcontinental divisions case, why is it significant to consider earnings "as freight carriers," affected by earnings on intraterritorial freight traffic, rather than earnings of the carrier as a whole, reflecting earnings on all traffic, including passenger traffic?

Nowhere does the report contain any findings or explanation of any kind justifying the Commission's interpre-

tation of the statute as permitting reliance upon earnings "as freight carriers." Nor is there any finding explaining the Commission's abrupt departure from its repeated decisions in general freight rate increase cases that the revenue needs of the carriers should reflect the need arising from all operations, both freight and passenger. E.g., *Increased Freight Rates and Charges, 1948,* 276 I.C.C. 9, 32-34 (1948); *Increase in Florida Intrastate Rates,* 278 I.C.C. 41, 67-68 (1950). Nor is there any finding explaining the Commission's complete departure from its rulings in prior divisions cases that "the amount of revenue required" referred to in Section 15(6) "is measured by net railway operating income." *Official-Southern Divisions,* 287 I.C.C. 497, 505 (1953). If, as appears implicit in the Commission's departure from its prior decisions, the Commission is adopting a new policy that the carriers must meet the needs for [fol. 1019] freight service by discontinuing passenger service, the report is deficient in failing to explain the reasoning which leads to adoption of a policy contrary to the interests of the rail traveling public. Moreover, how can the Commission decide a divisions case on a theory that requires wholesale discontinuance of passenger service without considering and making findings with respect to the existence of specific passenger trains which can be discontinued under the standards of train discontinuances established by it in administering Section 13a of the Act? There are no findings on these material issues which are implicit in the treatment of passenger deficits in the report, and there is no evidence upon which such findings could be made.

Moreover, even if the Commission could properly consider only the freight portion of the carriers' operations in passing upon revenue needs, it could not confine its consideration to "freight net railway operating income" without also considering the freight portion of the "railway property held for and used in the service of transportation." Nowhere does the report consider railway property devoted to freight service, or the increased investment which has

been made to provide railway property used in freight service although the record does indicate the magnitude of the additional investment which the Mountain-Pacific lines have made to handle the increasing volume of freight traffic.* If the statistical "freight net railway operating income" is to be considered, then the freight portion of investment in railway property must also be considered. The Examiners at least recognized the importance, under their "freight earnings" theory, of calculating rates of return using "freight net railway operating income," and conjectured that such a comparison would show a "greater degree of financial superiority for the western lines" (Ex. Rep. sheet 31). No such rates of return on investment in property allocated to freight service were shown by the Examiners, and we offered to prove that, even on this arbitrary and unlawful basis, the rates of return for freight service were *lower* for the western than for the eastern lines (M-P Exceptions, p. 110). The Commission's report [fol. 1020] does not mention our offer of proof, omits the Examiners' reference to rates of return on freight service and bases its conclusions on earnings "as freight carriers" without giving any consideration whatever to the amount of "*railway property* held for and used in the service of transportation" (emphasis supplied), as required by Section 15(6). This failure to consider one of the basic standards of the Act renders the order unlawful even if the "freight carrier" concept of the report were otherwise permissible.

For these reasons, the conclusions in the report based upon revenue need "as freight carriers" (sheet 67) and "freight earnings" (sheet 76) are unlawful even on the

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* The report refers to the $801 million additional net investment of the Mountain-Pacific lines in the period 1951-1955 (sheet 66). The record shows that this increase in net investment resulted from an increase in gross investment of $1,091,834,870, of which only $52,330,708, or 5 percent, represented investment in passenger cars (Exhibit T-387, Appx. H, Table 2, p. 1).

assumption that the statistical separation of carrier earnings is realistic and meaningful.

(3) The Denial of a Fair Hearing to the Mountain-Pacific Lines Which Results from the Reliance Upon Passenger Deficits.

The reason why there is no record showing the facts and circumstances underlying the bare statistics showing "passenger deficits" and "freight net railway operating income" is that the "passenger deficit" or "freight earnings" concept played no part whatever in this case until it was injected ***sua sponte*** by the Examiners in their recommended report.

None of the parties, at any time during the extensive hearings, ever claimed that revenue needs should be considered on the basis of earnings "as freight carriers." No witness presented testimony on the subject of "passenger deficits" or "freight net railway operating income." The statistics for certain individual roads that form the basis of the tables appearing in the report (sheets 62-63, 69) got into the record by sheer happenstance at the last hearing in the case and under circumstances that did not remotely suggest the use to which these statistics have been put in the report.

It was in the Examiners' report that the "freight earnings" concept of revenue needs made its first appearance in the case. At the first opportunity after this passenger deficit charge appeared in the case, the Mountain-Pacific lines offered to prove all of the facts necessary to establish the error of this theory (M-P Lines Exceptions, pp. 22-24 and Appendix II), and the report errs in not having accepted this offer.

[fol. 1021] Yet, the Commission's report adopts the "freight earnings" theory of its Examiners. This theory is unlawful and irrational for all of the many reasons previously pointed out. But if it was to be used as the basis for prescribing divisions, the Mountain-Pacific lines were entitled to an opportunity to offer evidence, by way of explanation or rebuttal, showing the true characteristics of

the passenger deficit statistics and the differences in circumstances between the passenger business of the Eastern, Midwestern and Mountain-Pacific lines. The points we made with respect to the Examiners' Report are therefore fully applicable to the Report and Order of the Commission. To avoid repetition, those points are here incorporated by reference. The Commission's denial of any hearing on the "passenger deficit"—"freight earnings" concept which governed its conclusions on revenue need, without giving any explanation for the denial of a hearing or even acknowledging that specific request for hearing had been made, is a denial of the fair hearing to which the Mountain-Pacific lines are entitled under the Act and the Due Process Clause of the Federal Constitution. *Interstate Commerce Commission* v. *Louisville & N.R.R.*, 227 U.S. 88, 93 (1913).

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[fol. 1022]

B. The Changes Since the Divisions of the Midwestern Lines Were Established.

In the portion of its conclusions dealing with the transcontinental divisions of the Midwestern lines, the report [fol. 1023] acknowledges that the important divisions were "the subject of the Commission's decision in 1934" (sheet 77). In its report in that case, the Commission expressly held that "the present divisions of transcontinental joint rates accruing to western trunk-line and transcontinental railroads were not unreasonable or otherwise unlawful" (Docket 15234, *Divisions of Freight Rates*, 203 I.C.C. at 299, 208 I.C.C. at 299). Now, however, the Commission refuses to interpret its own decision, saying that the "question of interpretation is of little moment, however, in view of changes which have occurred in the intervening years" (sheet 77).

The only changes specifically referred to in the report relate to changes in the flow of the traffic. In each instance the report compares relationships shown in the report

in Docket 15234 with relationships taken from "the 1953 traffic tests of the defendants" (sheet 77). However, the comparisons shown are entirely spurious and grossly misleading because, as used in the report, the comparisons are of unlike traffic.

"The subject of the Commission's decision in 1934" was narrower than the traffic at issue here, since the 1934 decision covered "the divisions of rates to and from *midwest-east* territory," as the report correctly notes in an earlier paragraph (sheet 77) (emphasis supplied). Thus, the traffic flow relationships cited from the report in Docket 15234 dealt only with "*midwest-east*" traffic.*

However, the issues in the present case extend not only to "midwest-east," but also to "Midwest-southwest" and "Midwest-northwest" traffic, as the sub-territories are defined elsewhere in the report (sheet 11). "The traffic tests of defendants" covered all of this midwestern traffic to and from the entire Mountain-Pacific territory, as the report also observes (sheet 10). When the report states "The 1953 traffic tests of the defendants show . . . 993,141 cars eastbound and 664,035 cars westbound," (sheet 77) the figures include *all* cars between Mountain-Pacific territory and *all* Midwestern territory (Exhibit T-310, p. 1), not the cars between the Midwest-east and transcontinental territory which were the basis of the figures set forth in the 1934 report in Docket 15234.

[fol. 1024] Accordingly, the comparison in this report between traffic data drawn from the 1934 report and data from the "traffic tests of defendants" does not measure changes in traffic flow since 1934, but reflects instead a comparison of differently defined bodies of traffic.

This difference in the coverage of the bodies of traffic being compared changes the result of the comparison in a most material manner. The exhibits setting forth the re-

* In addition, the portion of the 1934 report from which the figures were taken (203 I.C.C. 304, 320, 331) dealt only with traffic to and from transcontinental territory, not including Montana traffic which was the subject of separate consideration and separate evidence (203 I.C.C. at 345-348).

sults of the "traffic tests of defendants do not show the directional flow separately for the Midwest-east traffic.* But the data in the record can be adjusted to show the relationship between bridge and originating-terminating traffic, the other characteristic emphasized in the report (sheet 77)

> "In the 1934 report the Commission stated that about 60 percent of all transcontinental traffic and about 70 percent of the eastbound perishable movement was overhead traffic to or from points east of Illinois. In 1953 the traffic between mountain-Pacific and official territory was 52 percent of the total and the perishable percentage was 66."

This comparison is significant because the present divisions of the railroads serving Midwest-east are the same for "subdividing the western shares of the Official-transcontinental traffic" as for dividing traffic originating or terminating on those railroads, as stated in the report (sheet 16). Because originating or terminating freight is a greater burden than interchanging freight, a division which was a fair average for both services in 1934 would become unfair to the Midwest-east lines *if* the proportion of originating-terminating traffic has increased relative to the overhead traffic. Conversely, *if* the reverse were true, and the proportion of the overhead traffic has become

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* Nor would such data, if available, have any particular significance by itself. The primary significance of the reference to the unbalanced directional flow in the 1934 decision was in the greater cost of originating than terminating traffic (203 I.C.C. at 320). A change in the degree of imbalance is significant only if the burden of terminating the increased flow of westbound traffic is less than the burden of origination. This is not the case for important westbound movements, such as automobile parts, where the terminating lines have the burden of serving the automobile assembly plants, or for the great proportion of transcontinental traffic terminating in the costly Los Angeles and San Francisco Bay areas (as documented in the Brief of the Mountain-Pacific lines, pp. 104-105).

greater, the divisions of the Midwest-east lines should be *reduced.*

It is demonstrable that the Commission's conclusion that [fol. 1025] the proportion of the overhead traffic has declined since 1934 is wrong because of the comparison of the differently defined bodies of traffic. If the figures are adjusted to compare like with like, the change since 1934 has been an *increase* in the proportion of overhead traffic, leading to just the opposite conclusion from that drawn in the report.

The 1953 "traffic test of defendants" can be adjusted to exclude the effect of "Midwest-Southwest" and "Midwest-Northwest" traffic and thus make the data more closely comparable to the figures taken from the 1934 report in Docket 15234. This can be accomplished by using in the comparison not all the Midwest traffic but only 60 percent of that traffic, reflecting the earlier finding that "The percentage of total movement to and from these subdivisions [of the Midwest] were, east 60 percent, southwest 33 percent, and northwest 7 percent" (sheet 11). The effect of the adjustment on the comparison for all commodities is as follows:

	As Used in Report (includes Midwest-SW and Midwest-NW)		As Adjusted to Conform to Scope of Study in Docket 15234
1. Overhead Traffic (Official-Mountain-Pacific)	869,627		869,627
2. Originating-Terminating Traffic (Midwestern-Mountain-Pacific)	787,549	(x .60)	472,530
3. Total	1,657,176		1,342,157
4. Overhead Traffic as Percent of Total	52%		65%

Source: Exhibit T-310, p. 1

The effect of this adjustment on the comparison of perishables (Products of Agriculture-Eastbound) is as follows:

	As Used in Report (includes Midwest-SW and Midwest-NW)		As Adjusted to Conform to Scope of Study in Docket 15234
1. Overhead Traffic (Official-Mountain-Pacific)	213,287		213,287
2. Originating-Terminating Traffic (Midwest-Mountain-Pacific)	118,056	(x .60)	70,834
3. Total	331,343		284,121
4. Overhead Traffic as Percent of Total	64%		75%

Source: Exhibit T-310, pp. 8, 10.

[fol. 1026] Having adjusted the "traffic tests of the defendants" to provide data comparable to the figures from the 1934 report in Docket 15234, the critical comparison at sheet 77 of the report should be revised to read as follows:

> "In the 1934 report the Commission stated that about 60 percent of all transcontinental traffic and about 70 percent of the eastbound perishable movement was overhead traffic to or from points east of Illinois. In 1953 the traffic between mountain-Pacific and official territory was 65 percent of the comparable total and the perishable percentage was 75."

Since the correction to a comparable basis reverses the comparison, the increase in the proportion of overhead traffic necessarily leads to the conclusion that the division of the railroads serving Midwest-east territory should be *reduced*.

The change in the traffic flow, discussed above, has relevance as an indication of changes in cost relationships. No

direct comparison of changes in relative costs since the 1934 decision in Docket 15234 is available because, as the Commission found, the system average cost figures before the Commission in that case did not measure the cost of handling the transcontinental traffic (203 I.C.C. at 335). However, if the Commission is going to rely upon indicators of changes in conditions affecting costs, it should consider also the evidence showing the changes in operations which establish that the costs of the Midwestern lines have been reduced relative to those of the Mountain-Pacific lines. Because the Mountain-Pacific lines were using much heavier steam power for Mountain operations, they did not benefit from dieselization to the extent that the Midwestern lines did in converting from their light steam power to diesel power on transcontinental bridge hauls across the Midwest (Exhibit T-278, p. 35; Exhibit T-280, p. 35). As a result, the train tonnages of the trains handling transcontinental traffic increased to a far greater degree on Midwestern as compared with Mountain-Pacific hauls (Exhibit T-278, pp. 35-36), and the proportion of helper service on the Mountain-Pacific as compared with the Midwestern hauls increased as helper service was virtually eliminated in the Midwest (Exhibit T-636, Appx. B, pp. 7-8). These operating indicators should have been considered in reaching any conclusion with respect to changes in conditions since the present divisions with the Midwest were sustained by the Commission in its 1934 decision in Docket 15234.

[fol. 1027] Following the references to changes in the flow of transcontinental traffic, the report states: "The notable improvement in conditions affecting the transcontinental railroads previously described in this report has taken place since 1934." (sheet 77). Presumably, the reference is to the portion of the report showing that the increase in ton-miles and *gross* revenue of the transcontinental group increased at a greater rate than for the Western District as a whole (sheets 52-53). The report discounts the corresponding increases in expenses, and in net investment which have, in fact, caused the rate of return of the Mountain-Pacific lines to *decline* relative to the rates

of return of the Midwestern roads since the decision of the Commission in Docket 15234 (Exhibit T-272, p. 21; Exhibit T-656, p. 21). The sole reason given by the Commission for discounting the relatively poor showing of the Mountain-Pacific lines with respect to net railway operating income is the behavior of passenger deficits (sheets 54, 62-67). As a result, the reliance in the report upon a "notable improvement in conditions affecting the transcontinental railroads" in concluding that the divisions of the roads serving Midwest-east should be increased is infected by all of the errors arising from this mis-use of the passenger deficit theory previously discussed (pp. 110-114, *supra*).

* * * * * * *

[fol. 1028]

E. The Disruption of the Present Competitive Divisional Structure, and the Extreme Impact of Such Action on The Denver & Rio Grande Western Railroad

The mileage scale divisions prescribed in Appendix C of the report completely disrupt the transcontinental divisional groups for all Midwest-Transcontinental traffic and for the western hauls on Official-Transcontinental traffic. In addition to the erroneous and illogical nature of this feature of the Commission's action, previously discussed, this has most disastrous consequences for individual roads. Because the greatest proportion of transcontinental traffic of the Denver and Rio Grande Western is affected, we shall discuss this problem in terms of the effect of the Commission's action on that carrier.

The Commission's report gives no recognition to the practical consequences of its action on the highly competitive transcontinental routes, between western gateways, and unlawfully fails to consider the impact of its disruption of competitive routes on the D&RGW or any other individual carrier. The effect of the Commission's action can best be shown by setting forth examples applying the divisions prescribed by the Commission to typical competitive shipments.

The first example compares the present and prescribed divisions on a shipment between Chicago and San Francisco:

	Chicago-Council Bluffs	Council Bluffs-Denver	Denver-Ogden	Ogden-San Francisco
Present Divisions Exhibit MW-77, pp. 21, 23)	16.5	44.7 (17.9)	(26.8)	38.8
Prescribed Divisions	42		58	
Subdivisions of Prescribed Divisions (Assuming revenue prorate of divisions west of Denver)			(23.7)	(34.3)

As shown, the present divisions provide for a separation of the revenues between Council Bluffs and Ogden, with subdivisions that produce a division of 26.8 percent of the entire rate for the D&RGW haul between Denver and Ogden. Under the mechanics of Appendix C of the Commission's report, the revenue would be divided over Denver. Assuming that the lines west of Denver would share ratably in the reduction, using the present revenues as prorating factors, the D&RGW division would be reduced to 23.7 percent. This reduction from 26.8 to 23.7 would constitute an 11.6 percent reduction in the revenues of the D&RGW.

But this reduction, drastic as it is for a road dependent for 60 percent of its freight revenues on transcontinental traffic (Exhibit T-311, p. 7), is only the beginning. The further problem arises from the effect of the Commission's order on competitive shipments between the same points but via the Council Bluffs-Cheyenne-Ogden route, as shown in the following table:

	Chicago-Council Bluffs	Council Bluffs-Cheyenne	Cheyenne-Ogden	Ogden-San Francisco
Present Divisions Exhibit MW-72, p. 23)	16.5	44.7		38.8
Prescribed Divisions	22		78	
Subdivision of Prescribed Division on Present Divisions West of Council Bluffs		41.7		36.3

Between San Francisco, Calif. and (1)	Route East of Ogden (2)	Division of Lines West of Ogden			Division of D&RGW				
		Present (3)	Prescribed (4)	% Change (5)	Present (6)	Prescribed (7)	% Change (8)	If D&RGW Equalizes Competitive Divisions (9)	% Change (10)
Omaha, Neb.	D&RGW-Denver-CB&Q or CRI&P	46.5	41.4	-11.0	32.1	28.6	-10.9	23.5	-26.8
	D&RGW-Pueblo-MP	46.5	40.3	-13.3	32.1	27.7	-13.7	21.5	-33.0
	UP	46.5	No change	0.0					
Kansas City, Mo.	D&RGW-Denver-CB&Q or CRI&P	46.5	39.7	-14.6	32.1	27.3	-15.0	20.5	-36.1
	D&RGW-Pueblo-MP	46.5	40.8	-12.4	32.1	28.2	-12.1	22.5	-29.9
	UP	46.5	No change	0.0					
St. Louis, Mo.	D&RGW-Denver-CB&Q or CRI&P	40.9	36.1	-11.7	28.2	24.9	-11.7	21.9	-22.3
	D&RGW-Pueblo-MP	40.9	36.7	-10.3	28.2	25.3	-10.3	22.9	-18.8
	UP-Kansas City-MP	40.9	39.1	- 4.4					
Chicago, Ill.	D&RGW-Denver-CB&Q or CRI&P	38.8	34.3	-11.6	26.8	23.7	-11.6	21.7	-19.0
	D&RGW-Pueblo-MP-KC-CRI&P	38.8	34.9	-10.1	26.8	24.1	-10.1	21.8	-18.7
	UP-Council Bluffs-C&NW	38.8	36.3	- 6.4					
	UP-Kansas City-CRI&P	38.8	37.2	- 4.1					
Detroit, Mich. and Other Stations in Group E-4	D&RGW-Denver-CB&Q or CRI&P-Chicago	33.8	30.0	-11.2	23.3	20.6	-11.6	19.4	-16.7
	D&RGW-Pueblo-MP-E. St. Louis	34.1	30.7	-10.0	23.6	21.1	-10.6	19.0	-19.5
	UP-Council Bluffs-C&NW-Chicago	33.8	31.2	- 7.7					
	UP-Kansas City-MP-E. St. Louis	34.1	32.8	- 3.8					
New York, N. Y. and Other Stations In Group E-1	D&RGW-Denver-CB&Q or CRI&P-Chicago	28.1	23.9	-14.9	19.4	16.4	-15.5	15.4	-20.6
	D&RGW-Pueblo-MP-E. St. Louis	28.0	23.9	-14.6	19.3	16.4	-15.0	14.8	-23.3
	UP-Council Bluffs-C&NW-Chicago	28.1	24.9	-11.4					
	UP-Kansas City-MP-E. St. Louis	28.0	25.5	- 8.9					

[fol. 1031] As shown, the present divisions over this route provide for a separation of the revenues between Council Bluffs and Ogden, so that the lines west of Ogden receive the same percentage of the total rate (38.8) over either the route via Cheyenne or the competitive route via Denver. However, under the Commission's order, the lines west of Ogden receive 36.3 percent of the rate when the shipment moves over the Cheyenne route but only 34.3 percent of the same rate, or 2.0 percentage points less, if the shipment moves over the Denver route previously shown. On a carload shipment on which the total freight charges are $1000, there would be a $20 per car differential as between the two competitive routes.

Existence of different divisions over such highly competitive routes would have intolerable consequences. Even if it is assumed that the D&RGW could hold the lines west of Ogden to the lower division based on a revenue prorate of existing divisions, such a difference in the divisions would influence the routing of traffic against the Denver route and in favor of the route which pays the lines west of Ogden the higher divisions. For example, what can the D&RGW do to avoid losing not only 11.6 percent of its revenues on the Chicago-San Francisco traffic which it does carry but *all* of the revenues on traffic diverted to a competitive route? If the D&RGW makes a new subdivision of the prescribed division between Denver and San Francisco (58 percent) to equalize the competitive divisions of the lines west of Ogden at 36.3 percent, the resulting divisions for the D&RGW would be the balance, or 21.7 percent.

A reduction in its revenues resulting both from the Commission's order and the equalization of competitive routes would be catastrophic for the D&RGW. A reduction from its present division on Chicago-San Francisco traffic, now 26.8 percent, to a division of 21.7 percent would produce a reduction of 19.0 percent in the D&RGW's present divisional revenues on this important traffic.

The severe consequences of the prescribed divisions for the D&RGW shown in this example, first in directly reducing the divisions of the D&RGW and, secondly, in creating a competitive imbalance which either diverts the traffic or practically doubles the revenue loss, is characteristic of the impact of the Commission's order on the D&RGW. This is shown in the series of examples based upon typical shipments set forth in the table on the opposite page. This table shows the results of applying the prescribed divisions

(Continued on page 912)

Between Eugene, Ore. and (1)	Route East of Ogden (2)	Division of Lines West of Ogden			Division of D&RGW				
		Present (3)	Prescribed (4)	% Change (5)	Present (6)	Prescribed (7)	% Change (8)	If D&RGW Equalizes Competitive Divisions (9)	% Change (10)
Omaha, Neb.	D&RGW-Denver-CB&Q or CRI&P	58	49.5	−14.7	25.2	21.5	−14.7	13.0	−48.4
	D&RGW-Pueblo-MP	58	48.8	−15.9	25.2	21.2	−15.9	12.0	−52.4
	UP	58	No change	0.0					
Kansas City, Mo.	D&RGW-Denver-CB&Q or CRI&P	58	48.1	−17.1	25.2	20.9	−17.1	11.0	−56.3
	D&RGW-Pueblo-MP	58	49.5	−14.7	25.2	21.5	−14.7	13.0	−48.4
	UP	58	No change	0.0					
St. Louis, Mo.	D&RGW-Denver-CB&Q or CRI&P	51	43.9	−13.9	22.2	19.1	−14.0	14.3	−35.6
	D&RGW-Pueblo-MP	51	44.6	−12.5	22.2	19.4	−12.6	15.3	−31.1
	UP-Kansas City-MP	51	48.7	− 4.5					
Chicago, Ill.	D&RGW-Denver-CB&Q or CRI&P	48.4	41.8	−13.6	21.0	18.2	−13.3	14.2	−32.4
	D&RGW-Pueblo-MP-KC-CRI&P	48.4	42.5	−12.2	21.0	18.5	−11.9	14.0	−33.3
	UP-Council Bluffs-C&NW	48.4	45.8	− 5.4					
	UP-Kansas City-CRI&P	48.4	47.0	− 2.9					
Detroit, Mich. and Other Stations In Group E-4	D&RGW-Denver-CB&Q or CRI&P-Chicago	42.1	35.9	−14.7	18.3	15.6	−14.8	12.0	−34.4
	D&RGW-Pueblo-MP-E. St. Louis	42.6	37.3	−12.4	18.5	16.2	−12.4	12.6	−31.9
	UP-Council Bluffs-C&NW-Chicago	42.1	39.5	− 6.2					
	UP-Kansas City-MP-E. St. Louis	42.6	40.9	− 4.0					
New York, N. Y. and Other Stations In Group E-1	D&RGW-Denver-CB&Q or CRI&P-Chicago	35.1	28.5	−18.8	15.2	12.4	−18.4	9.5	−37.5
	D&RGW-Pueblo-MP-E. St. Louis	34.9	29.0	−16.9	15.2	12.6	−17.1	9.8	−35.5
	UP-Council Bluffs-C&NW-Chicago	35.1	31.4	−10.5					
	UP-Kansas City-MP-E. St. Louis	34.9	31.8	− 8.9					

[fol. 1033] to shipments between San Francisco and important points in the Midwest and East over competitive routes.

As shown in column 8 of this table, the prescribed divisions would reduce the revenues of the D&RGW on the San Francisco traffic in the range of 10.1 percent to 15.5 percent, assuming that the D&RGW could hold as its share of the Mountain-Pacific divisions a revenue prorate of the present divisions west of Denver or Pueblo. However, such a division produces substantial disparities in the divisions and percentage reductions in divisions over competitive routes, as shown in columns 4 and 5. If the D&RGW protected itself against a diversion of traffic by reducing its divisions still further in order to equalize the divisions over the competitive routes, the range of reduction in the D&RGW's present revenues becomes 16.7 percent to 36.1 percent, as shown in column 10 of the table.

Further examples, showing the effect of the prescribed divisions on shipments between Eugene, Oregon, and the same important points in the Mideast and East are shown in the table on the opposite page (now p. 911). Again, the table shows reductions in the D&RGW revenues as a direct result of the prescribed divisions ranging from 11.9 percent to 18.4 percent (column 8) and shows the substantial disparities in the divisions and percentage reductions over the competitive routes (columns 4 and 5). The further reduction of the D&RGW's present revenues necessary to equalize the divisions over competitive routes would be 31.1 percent to 56.3 percent (column 10).

As shown in these applications of the prescribed divisions to this series of important movements of transcontinental traffic, the Commission's order would result in a reduction of the present divisional revenues of the D&RGW averaging well over 20 percent.

For a railroad like the D&RGW, dependent for 60% of its total freight revenues on transcontinental traffic (Exhibit T-311, p. 7), such a result would spell financial ruin.

The latest financial data in this record show that a reduction of 20 percent in the transcontinental divisions of the D&RGW would produce a revenue loss of approximately $8½ million* for a railroad whose total net income was [fol. 1034] $10½ million (Exhibit MW-734, p. 3, line 30, cols. 10 and 13). The alternative to such a result would be even more catastrophic for the D&RGW, since a failure to equalize the divisions with the lines west of Ogden would result in the loss of all revenue on the volume traffic diverted to competitive routes.

It is no answer to this critical problem, compounded by the disruption of competitive routes, for the Midwestern lines to say that the Commission should have prescribed the divisions for the lines west of Ogden and Salt Lake City. This the Commission cannot do under pleadings that do not bring into issue the divisions over points 500 miles in the interior of Mountain-Pacific territory and on a record that contains no cost or other relevant evidence providing any lawful basis for dividing revenues as between lines east and west of Utah gateways. The Commission should recognize that the form of its order, prescribing divisions for only a part (up to Denver) of one of two competitive routes inevitably disrupts competitive relationships and imposes severe irreparable injury upon the D&RGW.

Accordingly, the Commission should exclude from its present order the prescription of divisions affecting any part of the competitive routes between the Missouri River and Utah gateways.

F. The Absence of Any Support for the Construction of the Prescribed Divisional Scales.

Divisional scales are prescribed in Appendix C of the report for use in calculating divisions as between Mountain-

* Freight revenues of $72,198,285 for 1958 (Exhibit MW-734, p. 14, line 6) times 60.13 percent (Exhibit T-311, p. 7), produces transcontinental revenues of $43,412,829. A 20 percent reduction in the transcontinental divisions of the D&RGW would thus produce an annual loss of $8,682,566.

Pacific and Midwestern lines. For the reasons previously set forth, the report improperly and inconsistently displaces the present group basis of transcontinental divisions with the prescribed mileage scales. A separate defect in the mileage scales is the manner of their construction.

The column 1 scale, prescribed in Appendix C for application to shipments on which origination or destination terminal service is performed in Midwestern territory, is, as the report suggests (sheet 85), "the so-called 29886 scale" prescribed in *Official-Southwestern Divisions,* 287 I.C.C. 553, 595 (col. 1) (1953).

The column 2 scale, prescribed for application to intermediate hauls in the Midwest, is the same as the scale for intermediate service in *Official-Southwestern Divisions* (287 I.C.C. at 595 (col. 2)).

[fol. 1035] The column 3 scale, prescribed for application to hauls in Mountain-Pacific territory (all of which involve origination or destination terminal service) is the same as the column 1 scale increased 10 percent (sheet 85). The 10 percent differential reflected in the column 3 scale is completely inadequate for the reasons already discussed.

The separate point next discussed does not deal with the use of divisional scales generally, or with the amount of the differential for Mountain-Pacific territory. The separate defect to be discussed here is the construction of each of the scales with respect to the relationship between line-haul and terminal service.

Columns 1, 2 and 3 of Appendix C all reflect the same basic construction. Column 2, the intermediate scale, follows precisely the same pattern as column 1, the only difference being the uniform deduction of 26 integers at each mileage. Column 3 also follows the same pattern as column 1, the sole difference being the 10 percent differential.

What, then, is the support for the construction of the column 1 scale in respect to the relationship of line-haul and terminal service? The report does not provide the slightest justification for the construction of the scale pre-

scribed; indeed, the report notes that the scale prescribed was not even proposed, much less justified, by any party (sheet 85). In the absence of any attempt at rationalizing and supporting the construction of the scale prescribed in the report in this case, there is no lawful support for the Commission's ultimate order as to the divisions prescribed between Mountain-Pacific and Midwestern lines.

Such reasons as were advanced in support of "the so-called 29886 scale" in the prior cases in which that scale has been prescribed do not support, but impeach, the application of that scale to the transcontinental traffic at issue here. In Docket 29886, *Official-Southwestern Divisions*, 287 I.C.C. 553 (1953), in which the scale was prescribed, no reason whatever was given in support of the construction of the scale. In a companion case in which the same scale was prescribed, Docket 29885, *Official-Southern Divisions*, 287 I.C.C. 497 (1953), the Commission did not articulate any reason for the relationship between line-haul and terminal service in the scale. On reargument in *Official-Southern Divisions*, 289 I.C.C. 4, 6-7 (1953), the construction of the scale was justified on the ground that it "corresponds generally" to the Docket 28300 class rate scale and that: "In shaping the progressing of a divisional scale, it is proper [fol. 1036] to take into account the distance progression of the rates to be divided."

This concept of dividing the rates in accordance with their progression, if it could ever have any validity under Section 15(6),* could have no application in this transcontinental divisions case. The transcontinental rates, including the transcontinental class rates, are not constructed in relation to any distance scale (Exhibit T-294, p. 13). Unlike the rates on Official-Southwestern traffic, for example, many of which moved on, or in fixed relationship to, a class rate scale, the transcontinental rates are governed by market

* The unlawfulness of divisional scales reflecting a rate scale progression was shown in the Mountain-Pacific lines' Brief dated June 13, 1960, pp. 244-272, which we incorporate by reference in this Petition as though fully set forth herein.

and other competitive forces which have no relation at all to any distance scale (Exhibit T-294, p. 14). Indeed, the vast majority of the transcontinental rates being divided in this proceeding do not progress upward with distance, but are blanketed for a thousand miles or more (Exhibit T-296, pp. 17, 40-45). Under such circumstances, the theory that the progression of rate scales may be used in making divisions because that is the way the rates being divided are made has no place in this transcontinental divisions case. As a result, the sole reason given in support of the construction of "the so-called 29886 scale" in the *Official-Southern Divisions* case in which the scale was first prescribed does not support, but impeaches, the use of the scale in this transcontinental divisions case.

The justification advanced in support of "the so-called 29886 scale" in the only other case in which that scale has been prescribed is also inapplicable in this transcontinental divisions case. In *Louisville & Nashville R. Co.* v. *Akron C. & Y. R. Co.*, 309 I.C.C. 491, 510 (1960), the Commission described the construction of the scale and the specific justification for the use of such a scale in that case:

> "It was made by allowing a factor equivalent to 221 miles each for origin and destination terminal service, plus the line-haul distance factors based on 50-mile blocks. This basis accords appropriate recognition to the terminal costs which, especially on the L.&N. at Louisville, are relatively high, and to the complainants' relatively short hauls."

Judicial review of the Commission's order in the *Louisville* [fol. 1037] *& Nashville* case upheld the prescription of the so-called 29886 scale, with its allowance of 221 miles for the terminal factor, as supported by specific cost evidence covering the "high cost" of terminal service experienced by the short-haul carrier in handling traffic at issue in that case. *Boston and Maine R. R.* v. *United States*, 208 F. Supp. 661, 671-672 (D. Mass. 1962), affirmed, 371 U.S. 26 (1962).

No such cost justification is advanced in support of "the so-called 29886 scale" in its application to the transcontinental traffic at issue in this case. No finding is made in support of the construction of the scale, much less a specific finding, based on evidence, supporting the use of a terminal factor equivalent to 221 miles of line-haul service as the proper relationship between line-haul and terminal service in handling traffic in Midwestern and Mountain-Pacific territories.* The report does not refer to any evidence supporting a terminal factor equivalent to 221 miles, and there is none. In fact, the Midwestern lines' own cost study shows that their terminal service is the equivalent of only 86 miles,** and there is no evidence supporting a terminal factor approaching 221 miles. Thus, there is no lawful basis on this record prescribing a scale with a 221 mile terminal factor for hauls including origin or destination terminal service.

Nor is there any lawful basis for applying to intermediate hauls, having no origin or destination terminal service, a scale which nevertheless has a "terminal" factor equiva-

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* The 221 miles, referred to in the *Louisville & Nashville* case is computed as follows: The column 1 scale has a factor of 65 at 50 miles and a progression of 12 factors per 50-miles of additional line-haul service (Appendix C, column 1). By extrapolation, the factor for terminal service (zero miles) is 65 minus 12, or 53. If the terminal has a value of 53, and 50 line-haul miles have a value of 12, the terminal factor is equivalent to 221 miles—that is, 53 divided by the quotient of 12 divided by 50.

Since the column 3 scale is the same as the column 1 scale, except for a consistent differential of 10 percent (Appendix C, column 3), the terminal factor in the column 3 scale is also the equivalent of 221 miles.

** Exhibit MW-150 sets forth unadjusted Rail Form A unit costs for the Midwestern lines in handling Midwest-transcontinental traffic, showing a terminal cost of 4.91¢ per cwt. and a line-haul cost of 0.05693¢ per cwt. mile (Exhibit MW-150, col. (e)). This shows terminal service to be the equivalent of 86 miles of line haul service (4.91 ÷ 0.05693).

lent to 112 miles (Appendix C, column 2).* The allowance of 112 miles as a "terminal" factor for an intermediate [fol. 1038] haul in which no terminal service is performed has never been explained or justified in any case and there is no explanation or justification even attempted in the report in this case.

The record includes a complete analysis of "the so-called 29986 scale" showing that the construction of the scale is improper, unlawful and completely inapplicable to the transcontinental hauls involved in this case (Exhibit T-299; Exhibit T-302). None of the deficiencies in the construction of the scale documented on this record are even discussed in the report. The complete failure of the report to consider this evidence, or to make any findings whatever on the subject of divisional scale construction, renders the order invalid for lack of necessary findings and for lack of substantial evidence to support it.

G. The Unlawful Prescription of a 15 Percent Minimum Division on Transcontinental Shipments.

All of the transcontinental primary divisions prescribed in the report are subject to a minimum of 15 percent. With respect to Midwest-transcontinental traffic for which mileage scales are prescribed, the report provides without any discussion: "In no case shall a primary division be less than 15 percent" (Appx. C. sheet 4). With respect to Official-transcontinental traffic, for which group percentages are prescribed, the lowest percentage for the East is 15 (Appx. B). The report makes it plain that the 15 percent division for group E-5 was not prescribed on the basis

* The column 2 scale has a factor of 75 at 200 miles and a progression of 12 factors per 50 miles of additional line-haul service. By extrapolation, the factor for "terminal" (zero miles) is 75 minus 48 (4 times 12), or 27. If the factor for "terminal" has a value of 27, and 50 line-haul miles have a value of 12, the "terminal" factor is equivalent to 112 miles—that is, 27 divided by the quotient of 12 divided by 50.

of any appraisal of the average hauls or other facts relating to the handling of transcontinental traffic originating or terminating in that group, but rests entirely upon the concept that 15 percent is a justifiable "minimum." As stated in the report (sheet 81):

> "Our findings provide for a defined group of Illinois points principally served by eastern and southern railroads, as well as some western lines, and including also Evansville, Vincennes, and Terre Haute, Ind., which are on or near the Illinois-Indiana boundary. (The complainants would prefer the exclusion of the Indiana points.) The defendants strongly object to the proposal in the recommended report of a uniform minimum division of 15 percent for the terminal lines serving this proposed southeastern Illinois group in lieu of present divisions said to range from 6 to 12 percent.* Both in many divisional bases voluntarily established [fol. 1039] in the past and as well in our decisions it has been common practice to accord minimum divisions for carriers having relatively short hauls, sometimes as high as 20 or 25 percent but more usually 15 percent. The increasingly burdensome terminal costs in recent years are persuasive that a 15-percent minimum is justified."

The sole reason given for the 15 percent minimum is the "increasingly burdensome terminal costs in recent years." Unlike the other percentages prescribed for Eastern divisions groups reflecting the Commission's conclusions on revenue needs, the minimum divisions are rested solely on a conclusion as to costs. The exclusion of the asserted revenue needs of the Eastern lines as a basis of the determination as to a minimum percentage follows from the fact

* That the present divisions are "said to range from 6 to 12 percent" does not rest upon defendants' statement but upon the testimony of the principal traffic witness of the Eastern lines (Exhibit E-1, p. 14).

that the minimum is applied only to group E-5 which is, as the report notes, served by Southern and Western railroads as well as some of the Eastern railroads.

We shall first show that the most recent cost evidence in this record, on the basis most extremely favorable to the Eastern lines, does not justify a minimum division of 15 percent or, for that matter, a minimum of 7 percent for transcontinental traffic. We shall then show that the "common practice" respecting minimum divisions referred to in the report has never been applied to very long and disparate hauls of the kind at issue in this transcontinental divisions case.

(1) The Absence of Foundation for a Minimum Division of More Than 7 Percent Even Under the Most Extreme Cost Comparison.

The report does not identify the cost evidence which was "persuasive that a 15-percent minimum is justified." The "restatement" of costs set forth in the report does not show any breakdown of terminal and line-haul costs (sheet 41). However, the conclusion basing a 15-percent minimum on costs can be tested by examining the cost evidence which is most extremely favorable to the Eastern lines, namely the Rail Form A unadjusted cost scales upon which the Eastern lines themselves relied as the basis of their proposal (Eastern lines' Exceptions, p. 53). These cost scales, for the most recent year of record show average costs for 50 miles in the East as 10.6 cents per hundredweight and costs for 2200 miles in the West as 140.1 cents per hundredweight (Exhibit E-700, p. 13). These costs would justify a percentage minimum of 7 percent ($10.6 \div (10.6+140.1)$).

These costs, relied upon by the Eastern lines, obviously [fol. 1040] overstate any proper determination of the minimum cost proportion of the lines serving group E-5. In the first place, these costs are based upon the unadjusted Rail Form A averages for Eastern District railroads alone (including the New England railroads but excluding Poca-

hontas lines), a basis of assembling even the unadjusted Rail Form A averages which was expressly criticized in the report (sheet 20). Furthermore, these unadjusted averages do not even reflect the adjustments embraced in the restatement of costs in the report which further reduce the Eastern costs (sheet 41). More significantly here, the costs do not reflect the participation of "southern railroads, as well as some western lines" serving group E-5 (sheet 81). Moreover, 50 miles used in the foregoing comparison is not the minimum line-haul service performed in handling transcontinental traffic and 2200 miles is not the maximum haul in the West on transcontinental traffic but is the approximate average haul to the Pacific ports. For these reasons, the 7 percent figure computed from the Eastern lines' own cost scales, overstates any proper minimum division for application to the transcontinental traffic.

It follows that the Commission's prescription of a 15-percent minimum on the basis of costs is not supported by substantial evidence and is contrary to the cost evidence most favorable to the Eastern lines.

(2) The Misapprehension Underlying the Belief that "Common Practice" Supports Prescription of a 15-Percent Minimum for Transcontinental Traffic.

As a prelude to the conclusion that a 15-percent minimum is justified on the basis of costs, the report states: "Both in many divisional bases voluntarily established in the past as well as in our decisions it has been common practice to accord minimum divisions for carriers having relatively short hauls, sometimes as high as 20 or 25 percent but more usually 15 percent" (sheet 81).

There is no such "common practice" where the hauls approach the length of the hauls on the transcontinental traffic here at issue. The Commission has never prescribed a minimum percentage for application to the transcontinental hauls, and the "divisional bases voluntarily established in the past" with respect to transcontinental traffic reflect the

divisions of 6 to 12 percent which are the present divisions for the points in group E-5 which are at issue here.

"Common practice" in other cases, where short hauls in [fol. 1041] one territory are being related to maximum hauls of 1200 miles in another territory, may properly lead to a minimum division of 15 percent. But where the same short haul is being related to a transcontinental haul of over 2000 miles, the *percentage* division justified for the short-haul carrier is obviously reduced. If the Commission had prescribed a minimum *dollar* division for short-haul carriers, such a minimum might conceivably be regarded as applicable whatever the service performed by the long-haul carrier. But where the minimum is stated as a percentage, the percentage necessary to protect a short-haul carrier becomes less as the proportion of the total service performed by that short-haul carrier becomes less. This is the principle that has governed the 25 percent and 15 percent minimum divisions in prior cases, and this same principle condemns the use of a 15 percent minimum for application to the transcontinental movement of traffic which, the Commission has recognized, "reflects the longest rail hauls in the United States." *Increased Freight Rates, 1947,* 270 I.C.C. 403, 448-449 (1948).

The application of this principle was documented in this record in the following testimony of an expert traffic witness (Exhibit T-304, pp. 7-9):

> "Where a percentage minimum is appropriate, as with a mileage prorate or constructive mileage prorate, the particular percentage selected depends upon the length of the total haul. 15% may be the proper percentage for total hauls of 1500 miles, but where the total haul exceeds 2000 miles, a lesser percentage minimum is appropriate for use with a mileage prorate.
>
> "Since the minimum is to compensate for the terminal service of a short haul carrier, the percentage which

will compensate for terminal service of the short haul carrier becomes less as the total haul (and the total revenue) are greater. A short haul carrier receives as much revenue per car as compensation for short haul and terminal service out of a lower percentage of the total revenue from a haul of 2200 miles as it would out of a higher percentage of the total revenue on a haul of 1200 miles. This has long been recognized in negotiating minima for use with divisions based on mileage prorates. This principle was applied in prescribing minima to be used in conjunction with the constructive mileage prorate prescribed in the trans-Missouri phase of the Commission's decision in Docket 15234. The Commission prescribed a 25% minimum on WTL traffic to and from points in trans-Missouri territory east of Colorado common points, but on the longer haul traffic between WTL and trans-Missouri West and South of Colorado common points, a lesser [fol. 1042] minimum of 15% was prescribed. 208 I.C.C. at page 302.

"On this same principle, if a 25% minimum is appropriate for 600 mile hauls from Iowa to Colorado common points, and a 15% minimum is appropriate for 1200 mile hauls from Chicago to Utah, then the appropriate minimum for the much longer haul transcontinental traffic would be 5% on hauls from Iowa to the Pacific Coast. On the even longer hauls from Indiana to the Pacific Coast, 5% would be more than adequate minimum for the terminal service of the Eastern lines.

"The 15% minimum used in connection with the 1200 mile hauls involved in the Official-WTL division case (Docket 28277), is consistent with the 15% figure used for hauls of like length in the trans-Missouri phase of Docket 15234. The hauls to which the 15% minimum applies in the Official-Southern and Southwestern cases are of like length. But where the total haul is much

greater, as it is in the transcontinental hauls, the 15% minimum is excessive."

On the basis of his analysis of the "common practice" with respect to minimum divisions, the witness concluded (Exhibit T-304, pp. 14-15):

"If a basis of divisions, whether stated in the form of an integer scale or group per cents, properly reflects the line-haul and terminal services performed and takes account of differences in conditions affecting the respective groups of roads, thereby producing a fair and equitable apportionment of the revenues, interjection of a minimum percentage would, by definition, defeat the application of a fair basis of divisions. In other words, if integers are properly constructed, a proper minimum is inherent in the provision for terminal service in the first mileage block of the scale and the use of a separate percentage minimum which produces a different division is necessarily wrong by the amount of the difference.

"If a constructive mileage prorate is used as a basis for arriving at divisions, and no provision is otherwise made for protecting the terminal carrier, then a minimum, for application to the origin or destination movement, should be properly related to the total haul of the traffic involved. On the transcontinental hauls, such a minimum should be no more than 5%, not the 15% figure used in connection with dissimilar, relatively short, traffic movements in other territories."

This conclusion is fully supported by the "common practice" in making divisions, including the practice in prior [fol. 1043] decisions of the Commission, dealing with hauls far shorter than the transcontinental hauls here at issue. In no case has the Commission rationalized the use of a 15 per cent or any other minimum division on any basis

which would make such a minimum division applicable to the transcontinental traffic.

Accordingly, the minimum division of 15 percent, prescribed in the report for all primary divisions of transcontinental shipments, is not only contrary to the cost evidence, but is also contrary to the principle underlying the "common practice" in determining minimum divisions with respect to the very different hauls to which such practice has applied.

* * * * * * *

[fol. 1044]

BEFORE THE

INTERSTATE COMMERCE COMMISSION

TRANSCONTINENTAL DIVISIONS CASES

Docket No. 31503 (and Sub-Nos. 1-5)

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, et al.,

VS.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.

PETITION FOR RECONSIDERATION AND MODIFICATION OF REPORT AND ORDER OF THE COMMISSION

The People of the State of California and the Public Utilities Commission of Said State.

Richard E. Tuttle, Roderick B. Cassidy, J. Thomason Phelps, Cyril M. Saroyan, Attorneys for the People of the State of California and the Public Utilities Commission of said State, 5072 State Building, San Francisco 2, California.

(Due Date: July 26, 1963)

[fol. 1045]

BEFORE THE

INTERSTATE COMMERCE COMMISSION

TRANSCONTINENTAL DIVISIONS CASES

Docket No. 31503 (and Sub-Nos. 1-5)

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, et al.,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.

PETITION FOR RECONSIDERATION AND MODIFICATION OF REPORT AND ORDER OF THE COMMISSION

On March 21, 1963, the Commission made its Report and entered its Order in these proceedings. The Report and Order were served upon the parties on March 28, 1963. As a result thereof fundamental changes are to be effected in the present divisions. Enormous transfer of revenues is ordered to be made by the Mountain-Pacific lines to the Official (Eastern) and to the Midwestern railroads.

Come Now the People of the State of California and the Public Utilities Commission of the State of California, as Intervener in these proceedings, and respectfully petition [fol. 1046] for reconsideration and modification by the Commission of its report and order. As grounds, therefore, it is urged as follows:

1. The conclusion is unwarranted that the Commission cannot recognize any differences in the degree of urgency among territorial groups for funds for additions, expansions, betterments and new equipment.

2. The inability to ascertain from the order the effect of the divisions prescribed renders it objectionable.

3. The unlawful and unreal use by the Commission of passenger deficits as basis for concluding that Mountain-Pacific lines should transfer increased divisions to other railroad groups on alleged ground of revenue need.

4. The total lack of any findings to support the Commission's view of the nature of passenger deficits.

5. The unlawful refusal by the Commission to give full effect to all the revenue needs of the Mountain-Pacific lines, including those related to increasing passenger deficits.

These grounds will be developed hereinafter. Preliminarily, we respectfully urge that the California Public Utilities Commission is vitally interested in the paramount public interest of the People of the State of California and the adverse effect of the instant decision upon such public interest. This Intervener stated in its brief that the matters [fol. 1047] involved in these cases are definitely not confined solely to the interests of the various participating railroad groups. There is a great deal more involved in determining just and reasonable divisions than a mere matter of bargain and trade between various railroad carriers. The Interstate Commerce Act and the decisions interpreting the act unmistakably indicate that divisions of joint rail rates are substantially affected with a public interest. Section 15(6) Interstate Commerce Act, *Kanawha Black Band Coal Co.* v. *C. & O. Ry.*, 142 I.C.C. 433, 435; *New England Divisions*, 66 I.C.C. 196, 199; *P. & W. Va. Ry.* v. *P. & L. E. R. R.*, 61 I.C.C. 272, 283; *Hudson & Manhattan R. R.* v. *P. R. R.*, 270 I.C.C. 739, 762. (pp. 6-8, Brief, California Public Utilities Commission, dated June 13, 1960.)

Bearing in mind that divisions once fixed or prescribed prove long-lived and only infrequently overhauled, it behooves the Commission to very carefully scrutinize and revaluate its decision in the light of the very obvious errors which are contrary to law and contrary to the record and which will be demonstrated to be such by the various petitioning parties. The far-reaching changes presently prescribed in the transcontinental divisions cannot but have

lasting damaging effects upon the economy of the West, to say nothing of the entire national economy. The transfer of millions of dollars from the relatively few railroads [fol. 1048] serving the Mountain-Pacific territory to the many railroads serving the East and the Midwest is of very serious public significance. The concern of the People of the State of California arises from their great stake in the ability of the railroads of this State to provide adequate service for the traveling and shipping public and to maintain freight rates which will enable the producers in this State to compete in the markets east of the Rockies.

The Mountain-Pacific lines depend for virtually half of their freight revenues upon their divisions of transcontinental rates. This is in contrast to the Eastern and Midwestern lines which rely mainly upon other traffic to meet their revenue needs. To these railroad groups transcontinental divisions constitute simply 6 percent and 15 percent, respectively, of their freight revenues. (Commission Report, pp. 21 and 22.)

I. The Conclusion Is Unwarranted That the Commission Cannot Recognize Any Differences in the Degree of Urgency Among Territorial Groups for Funds for Additions, Expansions, Betterments and New Equipment.

At page 75 of the report the Commission asserts as follows:

> "We are unable to agree with the defendants and the interveners that the public interest warrants increases in the divisions of the mountain-Pacific railroads in order to provide a source of investment funds required for enlarged facilities commensurate with industrial development in that region. The railroads in all sections of the country are faced with the con- [fol. 1049] tinuing necessity of raising funds for additions and betterments and new equipment, and we cannot recognize any difference in the degree of this urgency among the territorial groups."

Firstly, in so far as this intervener is concerned, no claim has been made that "... the public interest warrants increases in the divisions of the mountain-Pacific railroads ..." as alleged above. The thrust of this intervener's plea has rather been not to reduce the presently existing divisions. We have heretofore stated in our brief that it is of vital concern to the people of the State of California that there should be no diversion of revenues from the railroads serving this State as a result of changes in the present divisions of joint rates lest it have the effect of weakening these railroads by depleting their revenues and thereby tending to impair their ability to modernize and expand facilities as required to be better able to serve the expanding economy. (Brief, pp. 5-6.)

Other such expressions heretofore set forth by this intervener follow:

"... The People of the State of California, and their economy, are dependent upon the transcontinental railroads. If the railroads terminating in California should be deprived of earnings by reductions in divisions, their ability to serve the People of this State adequately, and at reasonable rates, would be seriously impaired." (Brief, p. 9.)

* * * * * * *

[fol. 1050] "... They [the railroads] cannot be assured that any share of the revenues lost by one group of railroads to another such group through readjustment of divisional arrangements can be recouped through an increase in freight rates. The risk is very great that revenues which are taken away cannot be replaced." (Brief, pp. 10-11.)

* * * * * * *

"The growing economy of California and the West will require more and more railroad transportation. The railroads serving the area must be in a financially sound position if they are to keep their lines and oper-

ating properties and facilities in condition to handle the increased tonnages required and expected in the future." (Brief, p. 12.)

* * * * * * * *

". . . it is urged that the railroads serving California can ill afford to give up any of their revenues without harmful consequences to the people and the economy of this State." (Brief, pp. 11-12.)

In the discussion of revenue needs, the recommended report of the Examiners stated as follows:

"The report in *Class Rates, Mountain-Pacific Territory, supra,* contains a detailed discussion of the growth and economic development of mountain-Pacific territory and its relation in those respects to other territories. To a considerable extent that discussion was based on evidence presented by the mountain-Pacific State commissions, which were there supporting a reduction in the class rates but are here aligned with the defendants in arguing for an increase in their divisions. Some of that evidence was also incorporated in the present record."

The Commission reiterates practically the same language at page 50 of the instant report. In our Exceptions to the recommended report of the Examiners, we objected to the above statement that the State Commissions "were [fol. 1051] supporting a reduction in the class rates but are here aligned with the defendants in arguing for an increase in their divisions." We excepted in the following terms:

"The quoted statement is not only gratuitous, but erroneous. It misstates the position of most of the State Commissions in the class rate case, and misstates the position at least of the California Public Utilities Commission, an intervener, in the instant case. On

the latter point, we need only repeat the following language from page 9 of the brief filed by this intervener in the instant cases;

> "'In view of the language of Section 15(6) of the Act, however, it is urged that the Commission give due consideration to the tremendous importance to the public of the transportation services of the rail carriers. The People of the State of California, and their economy, are dependent upon the transcontinental railroads. If the railroads terminating in California should be deprived of earnings by reductions in divisions, their ability to serve the People of this State adequately, and at reasonable rates, would be seriously impaired.'" (Exceptions, p. 10.)

The recommended report alleged that the defendants and "their intervening allies" proposed that the divisions [to the transcontinental lines] be increased at least ten percent. (Prop. Report, p. 33.) Exceptions filed by this intervener questioned our inclusion in this category of intervening allies. (Exceptions, p. 20.) This intervener has not requested a ten percent increase, or any increase for that matter, in the divisions for the transcontinental lines. [fol. 1052] The practical and pressing need for the Mountain-Pacific lines for funds arises from the compelling public pressure on these roads to expand railroad plant and to meet the transportation needs of the nation's fastest growing area. As has been explained, the Official and Midwestern roads have the very different problem of serving a relatively mature area and of administering stable or shrinking transportation plans. Increased investment and plant expansion have followed because of serving the rapidly growing Mountain-Pacific territory. This is in contrast to what was testified to by witnesses for the Eastern and Midwestern groups. A NYC witness testified: "You have to contract facilities today in the East rather than expand them." (Tr. 1486.) The Pennsylvania railroad wit-

ness agreed that Eastern roads have "shrinking plants." (Tr. 381-382, 9830.) The contraction of railroad plant in the East and Midwest is exemplified by Pennsylvania's program to eliminate thousands of miles of track (Exh. T-336, p. 37; Tr. 9830-31), the NYC's program for eliminating mileage of "unnecessary tracks" (Exh. T-106, p. 20) and the C&NW's program for abandonment of line and other elimination of excess track (Exh. T-350, pp. 17-19; Exh. MW-453). (See brief, Mt.-Pac. Railroads, June 13, 1960, p. 146.) The record is clear that the Mountain-Pacific territory is growing at a rate far exceeding the [fol. 1053] growth in other territories. Growth in population, expansion of economic activity has been and continues to be at an explosive rate. Growth of population in Mountain-Pacific territory will be at more than twice the rate expected for the Midwest and East. (See Brief Mt.-Pac. Railroads, p. 136; pp. 144-146.)

This intervener, speaking more specifically for the State of California, has heretofore asserted that there is an ever-increasing need for improved services by the rail carriers operating here. The economic life of California is urgently dependent upon rail transportation, probably more so than any of the other states in the United States. The railroads serving this state must be in a position to maintain and improve their plant to serve the growing needs of the people of this state. The railroad carriers have, in the past, added enormously to their investment in plant and equipment to provide adequate service. These expenditures must not only continue, but must be increased as conditions demand in the future.

The critical need for improvement and expansion of rail plant is even more acute now because of the phenomenal growth that has taken place. This growth has presently made the State of California the nations most populous state.

[fol. 1054] The present population growth and industrial expansion is expected not only to continue unabated in California, but to accelerate at an even faster tempo. The

need for greater expansion of the western railroads is only too evident.

The Commission should indeed consider as part of the revenue needs of the Mountain-Pacific lines the necessity for these carriers to maintain adequate revenues in order to modernize and expand facilities to be better able to continue increasing their service to the public of this territory through expansion of plant and equipment commensurate with the fabulous growth of California and of the western states.

A witness for the Mountain-Pacific lines expressed this phenomenal growth trend in the following manner, and we quote from part of his testimony:

> "... That the present economic trend should continue in the Mountain-Pacific territory and that it should not be retarded by inadequate railroad plant, is not solely a regional concern. To the contrary, it is of national concern, and is of vital importance to all elements of our national economy, including, I venture, the complainants in these proceedings. The outstanding fact in this country's dynamic development has been the surge of people and industry to the frontiers of the West. The manufacturers, financial interests, merchants and carriers of the East and Middlewest have benefited, as well as those who moved into these developing regions. Any disposition of these proceedings which will stifle this development would, I submit, be a disservice to the nation and to the railroad industry as a whole." (See Brief, p. 220, Mt.-Pacific Railroads.)

[fol. 1055] It is submitted that ordering an enormous transfer of revenues by the Mountain Pacific lines to other carrier groups will indeed help stifle this development. It would seem logical to recognize that there is a degree of urgency in such a situation where the Mountain-Pacific roads depend on approximately 50 percent of their revenues

from divisions. The ability of these roads to serve the expanding territory would be impaired by the drastic reduction in divisions as ordered, completely out of proportion to the benefit to the total operations of the Eastern and Midwestern roads to whose financial condition the transcontinental traffic is only of incidental importance.

This intervener submits that the facts here do present a situation calling for recognition of a degree of urgency with respect to the Mountain-Pacific lines and the more acute necessity for these lines to raise funds for additions and betterments and new equipment. These problems cannot be solved by reducing their divisions as the Commission is attempting to do.

II. The Inability to Ascertain From the Order the Effect of the Divisions Prescribed Renders It Objectionable.

The report does not indicate the dollar effect of the prescribed divisions. A change in divisions on asserted grounds of revenue needs, without knowledge of the amount being transferred to the Eastern and Midwestern lines, [fol. 1056] does not tell us whether the alleged revenue needs of those roads are being met. It cannot be ascertained whether the increased divisions are or are not in excess of the contribution which transcontinental traffic ought to make to the Eastern and Midwestern roads.

How does this transfer affect the revenue needs of the Mountain-Pacific lines? Does it impair the financial ability of these lines in performing their service obligations and meeting the needs of the public in their own territory? The revenue effect of the Commission order must be determined so as to make the above determinations.

The Commission asserts at page 76 of its Report that "under the requirement of the public interest that all essential parts of the transportation system be maintained, so far as possible, in effective working condition, we believe that there should be increases in the complainant's divisions reflecting revenue needs . . . ." The above is an

ultimate conclusion. It is without support of essential underlying findings of fact. There is no finding made identifying the particular transportation needs which it is necessary to protect by transfer of divisional revenues. There is no finding of the amount of revenue necessary to accomplish the objective required by the public interest. And what about the effect of the transfer of substantial amounts of revenue upon the transportation needs of the [fol. 1057] public being served by the Mountain-Pacific lines from whom revenues are being taken? Will the transfer from one group to the other help or hurt the overall public interest? This is not ascertainable.

Bearing in mind, always, that as to the Official lines (Eastern) as a whole, transcontinental traffic makes up but 6 percent of the total freight traffic, any increase in divisions, in whatever amount, could have little effect on the overall financial condition of those roads and their ability to serve the public. As for the Midwestern lines, only 15 percent of their total freight revenues are received from transcontinental traffic. Hence, the increase in divisional revenues to those two groups of roads would be borne by a few principal Mountain-Pacific roads who depend for half of their total freight revenues on these divisions.

It is respectfully urged that the ability of these Mountain-Pacific roads to serve the rapidly growing areas in the West would be impaired completely out of proportion to the benefit to the total operations of roads in the East and Midwest. Transcontinental traffic is only of minor importance to the financial condition of those roads. The significance of the relative importance of transcontinental traffic to the respective groups is that a transfer of divisional revenues from the Mountain-Pacific lines to the Eastern and Midwestern roads would severely impair their [fol. 1058] ability to serve the public of the expanding West without producing any real improvement in the financial position of the Eastern and Midwestern lines.

We do not find any identification anywhere in the report of the parts of the transportation system which must be maintained in effective working condition through a transfer of divisional revenues, nor the amount of revenues required to reach that objective. It is true that the report states there are differences in earning power and the Eastern railroads are in a less advantageous situation as freight carriers. But a mere disparity in earnings from freight operations certainly cannot provide the basis for transfer of divisional revenues on grounds of revenue need. Commissioner Bush has expressed it well in his concurring opinion, that the objective in divisions cases "is not to equalize fortunes", and Commissioner Freas has declared in his dissent as follows:

> ". . . I consider it improper to equalize the different fortunes of groups of carriers which are the result of economic conditions prevailing in the various localities . . . . With equalization as the objective there will be little point or incentive for either investor or management to seek out and invest money or expend effort in the more promising carriers."

In any case where the issue before the Commission is the amount of revenue which a carrier should get from one part of its business in order to insure a just contribution [fol. 1059] to its overall revenue needs, an absolute prerequisite to decision is a determination as to the amount of the overall needs and the amount of the transfer that should be made to meet those needs. This principle was plainly stated in *State of Illinois* v. *United States,* 146 F. Supp. 195 (N.D. Ill. 1956). The question before the Court was whether a Commission order under Section 13(4) of the Interstate Commerce Act permitting an increase in intrastate passenger fares designed to "make a fair contribution toward respondent's indirect costs and return on investment," and thus to avoid an undue burden on interstate commerce, could be sustained without precise

findings as to the total amount of the indirect costs and return on investment of the carrier and what a fair contribution from the intrastate passenger service to those revenue needs would be. In striking down this order, the Court said (146 F. Supp. at pp. 199, 200):

> "The report of the interstate commission completely ignores that, in determining intrastate fares, a controlling inquiry is what contribution from the intrastate traffic would constitute a fair proportion of the railroad's income. In the case at bar it is not sufficient that the interstate commission found that the prescribed rates will 'make a fair contribution toward respondent's indirect costs and return on investment'. A fair proportion of a carrier's total income is not the same as a contribution to indirect costs and return on investment. Paying all of the costs of suburban service and, in addition, making a contribution to the other costs of the railroad, may well be more than contributing a fair proportion of Milwaukee Road's total income. Nor is it sufficient that the inter- [fol. 1060] state commission found that, to the extent that the suburban service 'fails to meet the out-of-pocket costs and make all the contribution that it reasonably can to respondent's indirect costs', it discriminates against its freight operations. This finding is no substitute for one as to what it should contribute as a fair proportionate share of the railroad's total income. Without the latter finding the order of the interstate commission cannot stand . . . .
>
> ". . . If a contribution is to be made toward the satisfaction of an obligation, it is obvious that the extent of the obligation must be fixed; otherwise no one can know what the size of the contribution should be. We are here speaking of an involuntary contribution. The limitless requirements implicit in the parts just cited from the report are reminiscent of public fund raising campaigns which used as their slogan

'Give till it hurts'. That was a legitimate civic or patriotic appeal. However, we are here confronted with the imposition of an involuntary contribution being exacted by legal means. To be sustained, it must be based upon a finding of the extent of the obligation. It cannot be supported by a vague reference to an unascertained amount of 'indirect costs and taxes' or what the suburban service can reasonably contribute to the Milwaukee Road's 'indirect costs' or 'a fair contribution toward respondent's indirect costs and return on investment'."

On appeal to the Supreme Court, the District Court's treatment of the failure to make findings as to the consequences of its order upon the revenue needs involved was unanimously upheld (*Chicago M., St. P. & P. R. Co.* v. *Illinois,* 355 U.S. 300, 309-310, note 8):

"We agree with the District Court that that portion of the prescribed increases designed to produce $77,000 annually as a contribution to indirect costs and taxes is not based upon adequate findings. There is no finding of the total of indirect costs and taxes to which contribution is to be made, nor any finding from which we may infer how the ICC derived its conclusion that [fol. 1061] a $77,000 contribution was fair. *It is axiomatic that to know whether something is a fair proportionate part of something else, we must be told what the something else is.*" (Emphasis supplied.)

III. The Unlawful and Unreal Use by the Commission of Passenger Deficits as Basis for Concluding That Mountain-Pacific Lines Should Transfer Increased Divisions to Other Railroad Groups on Alleged Ground of Revenue Need.

First, and foremost, the alleged passenger deficit subject was never an issue in these proceedings. There was no testimony on it. There was no discussion thereon in

the voluminous briefs filed by the various parties. Hence, this subject matter is not based upon the record made by the parties themselves, but upon a newly created issue. It was initially created by the examiners using passenger deficit data outside of the record. We stated in our Exceptions, and repeat now, that it is apparent that the examiners had fixed opinions concerning this matter of passenger deficits as a result of the recommended report issued in the Railroad Passenger Train Deficit case. (Docket 31954.) They injected these fixed opinions into the divisions cases. It was a new and contrived charge, not advanced by any of the parties. It, in effect, charged the Mountain-Pacific lines with being inefficient in the conduct of their passenger operations. This charge is carried through into the present report of the Commission as will be explained hereinafter. In so doing an attempt is made [fol. 1062] to inflate the earnings of the Mountain-Pacific lines. A reduction in the statistical passenger deficit is equated with an annual savings resulting in enhanced earnings for the Mountain-Pacific lines, hence providing them sufficient funds to help materially for use in addition and betterment purposes.

Some of the interveners expressed anxiety over the question as to how the Mountain-Pacific railroads could continue to supply the necessary funds to serve the ever-expanding economy in the West. They posed the following question in their brief:

> "Where then is the money necessary to provide additional facilities and to maintain the earnings of the Mountain-Pacific Carriers to come from?" (p. 7, Brief of Mountain States Interveners, dated May 11, 1960.)

To this question the Examiners answered as follows in their recommended report at page 31:

> "The obvious answer to the question stated in the foregoing quotation is that a reduction in the passenger deficit of the Mountain-Pacific lines, which would

seem to be imperative sooner or later, should help materially in furnishing funds for additions and betterments. The interveners are in a position to assist in such a course by taking a sympathetic attitude towards discontinuance of unprofitable passenger service."

The reliance upon the reduction of the passenger deficits of the Mountain-Pacific lines was the predominant and oft-repeated subject in all portions of the Examiner's recommended report. It was in fact the basis for their conclu- [fol. 1063] sion that the revenue needs of the Eastern and the Midwestern railroads warranted an increase in their transcontinental divisions; further, that the Mountain-Pacific roads could support the transfer of revenues (pp. 27-33, 34 of Examiner's Report). This Intervener urged that the use of passenger deficits was highly improper, and that it was improper, too, to draw the conclusion that the transcontinental lines could offset a reduction in freight divisions with a future reduction in passenger losses. Even assuming greater passenger deficits exist among the Mountain-Pacific railroads, we argued that there always has been a greater potential for reduction of passenger train service in the East than in the West because of the greater amount of service offered by the railroads between many points by a number of different railroads. Since this condition does not exist to any degree in the West, it is obvious that a much greater capability exists for reduction of passenger train service and elimination of deficits in the East than in the West. Certainly it is simpler to grant discontinuance of one of several pairs of trains per day between any two cities than to allow discontinuances of the last pair of passenger trains operated by a railroad, as would often be the circumstances existing in the West.

[fol. 1064] We emphasized the fact that the state regulatory agencies in the western states must, of necessity, give greater weight to the question of public convenience and

necessity when considering the possibility of service discontinuance where, by so allowing a particular discontinuance of passenger rail service, they may be completely eliminating this method of travel between particular points. With passenger service between many points in the West being at a bare minimum at the present time, any further discontinuances would result in the entire elimination of rail passenger, mail and express services in many areas.

One need only remind the Commission of what it declared in its recent decision in Docket 31954, the Railroad Passenger Train Deficit case:

> "We are of the view that complete elimination of passenger train service would not be a solution within the public interest. Economic railroad passenger service is, and for the foreseeable future will be, an integral part of our national transportation system and essential for the nation's well being and defense." (1959) 306 I. C. C. 417, 484.

The Commission in its report in like manner resorts to the passenger deficit in answering the crucial question concerning the necessary funds and their source to the Mountain-Pacific lines to service and promote the expanding economy of the western areas involved. Quoting from portions of the Commission report, we find the following stated:

> [fol. 1065] "In comparing net railway operating income and rates of return based thereon, differences in respect of the passenger deficit, which have an important bearing on such comparisons should also be considered. (Sheet 62.)
>
> * * * * * * *
>
> "The comparisons of freight net railway operating income and passenger deficits also have a bearing on the assertion of the defendants that 'the increased in-

vestment required in serving the growing mountain-Pacific territory has produced no return for the owners of the Mountain-Pacific roads.' *This alleged deprivation results from passenger deficits of those roads, as will now be explained.*" (Sheets 65-66.)

* * * * * * *

". . . the defendants say that 'in the 5-year period 1951-1955 the mountain-Pacific roads found it necessary to increase their net investment in transportation property by $800 million * * * but this increase in investment produced not one penny of earnings.' Defendants say further by way of explanation:

> "The net railway operating income of the mountain-Pacific rail group since 1950 has never equalled the 1950 figure. In effect, this group of carriers has yet to receive any return on the added $801 million investment in rail plant which it has made since the beginning of 1951.

"Between 1951 and 1955, inclusive, the major mountain-Pacific railroads (AT&SF, GN, NP, SP, and UP) increased their net investment by $731 million and the improved facilities were undoubtedly helpful to them in handling a steadily growing volume of traffic, which measured by revenue ton-miles showed an average annual increase in 1951-58 of 10 percent above 1950 and produced freight net railway opertaing income on the average 11 percent higher each year in 1951-58 than in 1950. Their decline in net railway operating income from all services after that year reflects the fact that their average annual passenger deficit in 1951-58, $174.9 million, was 58 percent greater than that of 1950.

[fol. 1066] "The defendants lay stress on the fact that in 1956 the eastern lines' net railway operating income from all services was 22 percent higher than it was in 1951, while the increase for the mountain-Pacific railroads in the same period was only 4 per-

cent. Here again the differing passenger deficits must be kept in mind. A comparison of freight net railway operating income of the two groups in 1956 and 1951 shows an increase of 6 percent for the eastern lines and 13 percent for the transcontinental lines. (Sheet 67.)

In concluding its discussion of the subject of passenger deficits initially injected into the proceeding by the examiners, the Commission summarized its position as follows:

> "Upon the facts relating to revenue need discussed on preceding pages, it is our conclusion that the eastern railroads are in a less advantageous situation *as freight carriers* than those in the western district." (Report, page 67.)

It might be interesting to note that this language is identical with that used by the Examiners in their Recommended Report. (Recommended Report, page 31.)

It was on the basis of this erroneous conclusion as to revenue need, which rested on an assumption of the hypothetical elimination of passenger deficits by the Mountain-Pacific lines, and the status of the respective groups of roads *as freight carriers* that the Commission undertook to support its conclusion that the transcontinental divisions of the eastern lines should be radically increased.

[fol. 1067]

IV. The Total Lack of Any Findings to Support the Commission's View of the Nature of Passenger Deficits.

The legal standards controlling the exercise by the Commission of the powers conferred upon it by the Interstate Commerce Act are set forth in the Administrative Procedure Act. Section 8(b) of this latter Act provides that all decisions shall "include a statement of . . . findings and conclusions, as well as the reasons or basis therefor, upon

all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. § 1007(b).

The U. S. Supreme Court has repeatedly enforced this requirement. The Court's last full statement of the rule is found in the recent case of *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 167-168 (Dec. 1962):

> "Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrafive action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion.' *New York* v. *United States,* 342 U.S. 882, 884 (dissenting opinion). 'Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body.' *Federal Communications Comm'n* v. *RCA Communications, Inc.,* 346 U.S. 86, 90. The Commission must exercise its discretion under § 207(a) within the bounds expressed by the standard of 'public convenience and necessity.' Compare *id.,* at 91. And for the courts to determine whether the agency *has* done so, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' *Phelps Dodge Corp.* v. *Labor Board,* 313 U.S. 177, 197. The agency must make findings that support its decision, and those findings must be supported by substantial evidence. *Interstate Commerce Comm'n* v. *Carolina Carriers Corp.,* 315 U.S. 475, [fol. 1068] 488-489; *United States* v. *Chicago, M., St. P. & P. R. Co.,* 294 U.S. 499, 511. Here the Commission made no findings specifically directed to the choice between two vastly different remedies with vastly different consequences to the carriers and the public. Nor did it articulate any rational connection between the facts found and the choice made."

The Commission's whole discussion of the relative revenue needs of the Mountain-Pacific lines rests upon the

single unreasoned assertion that "in comparing net railway operating income and rates of return based thereon, differences in respect of the passenger deficit, which have an important bearing on such comparisons should also be considered." (Report, p. 62.) Why should "differences in respect of the passenger deficit . . . be considered" in the determination of the relative revenue needs of Eastern and Mountain-Pacific lines?

If the amounts of the respective passenger deficits suffered by each group are inherent in the efficient operations of the "contending groups" as the Commission has found, what possible relevance do those amounts or the difference between them have to the relative revenue needs of the respective groups of railroads? What facts or arguments support the new view that these deficits can be substantially reduced? What should the Mountain-Pacific lines do in order to bring their deficits down in a way that will actually improve their financial position. If the Commission is telling the Mountain-Pacific lines that they should [fol. 1069] meet their need for revenue to supply freight service by discontinuance of passenger service, as seems implicit, how does the Commission rationalize its resolution of this critical policy question which it has decided adversely to the traveling public? And how can a decision that passenger service should be discontinued in Mountain-Pacific territory be made generally without considering the facts as to specific trains in accordance with the procedures established for train discontinuance cases in Section 13a of the Act?

None of these questions are answered. At least a part of the reason for these omissions probably lies in the fact that there is not a single fact in the record to substantiate the Commission's novel view. None of the parties to this proceeding has even suggested an argument that would support such a view. The Commission's distortion of the revenue needs evidence by use of the wholly artificial device of comparative passenger deficits is thus its own creation. The Commission gave no explanation or justification

for its creation, and, in doing so, it plainly violated Section 8(b) of the Administrative Procedure Act.

[fol. 1070]

V. The Unlawful Refusal by the Commission to Give Full Effect to All the Revenue Needs of the Mountain-Pacific Lines, Including Those Related to Increasing Passenger Deficits.

It is submitted that the Commission's reliance upon the returns from the freight operations alone in transferring divisional revenues on the basis of "revenue need" is incompatible and opposed to the provisions of Section 15(6) of the Interstate Commerce Act. This section of the act requires the Commission to consider the revenue needs of the contending groups of rail carriers on "railway property held for and used in the service of transportation." This provision applies to all property held for and used in the service of transportation, including that used in the service of passenger transportation:

> "The language, 'property held for and used in the service of transportation', is broad enough to include all carrier property. It requires no discussion to demonstrate that §15(6) authorizes the Commission to take into account and give due weight to revenues from all transportation service, the operating expenses and taxes chargeable to the same and the amounts available as compensation for the use of all carrier property." *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349, 360 (1936).

All of the revenue needs of the contending groups of carriers must be considered. Revenue needs cannot be neatly classified as freight revenue needs, passenger revenue needs, or other revenue needs. And the divisions set must reflect all of those needs. There is one qualification. [fol. 1071] Section 15(6) of the act does provide expressly that the Commission shall refuse to take into account rev-

enue needs that are related to operations which are either inefficiently conducted or unimportant to the public. Certainly neither of these qualifications applies in any way to the passenger operations of the Mountain-Pacific lines. This is recognized by the Commission in its obvious and intentional failure to make any findings to that effect. In fact the Commission declares at page 72 of its report that: "In our opinion the record shows that none of the contending groups is more or less efficiently operated than another."

There is no question that the passenger deficits of the Mountain-Pacific lines are and should be considered as inherent burdens unavoidably incurred in the discharge of valuable public obligations. Under unequivocal language of the act, they must be considered in the determination of the revenue needs of these lines.

Section 15(6) of the act adopts the established principle that a public utility cannot discontinue a part of its service simply because that part has become unprofitable. This principle has consistently been applied to passenger train discontinuance cases by the United States Supreme Court. In *Chesapeake & Ohio R. Co.* v. *P. S. C. of W. Va.*, 242 U.S. 603, at pages 607-608, the Court stated the following:

> [fol. 1072] "One of the duties of a railroad company doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment of the powers and privileges granted by the State and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided merely because it will be attended by some pecuniary loss. *Atlantic Coast Line Railroad Co.* v. *North Carolina Corporation Commission*, 260 U.S. 1, 26; *Missouri Pacific Ry. Co.* v. *Kansas*, 216 U.S. 262, 279; *Oregon Railroad & Navigation Co.* v. *Fairchild*, 224 U.S. 510, 529; *Chicago, Burlington & Quincy R.R. Co.* v. *Wis-*

consin Railroad Commission, 237 U.S. 220, 229. That there will be such a loss is, of course, a circumstance to be considered in passing upon the reasonableness of the order, but it is not the only one. The nature and extent of the carrier's business, its productiveness, the character of service required, the public need for it, and its effect upon the service already being rendered, are also to be considered. Cases *supra.*" (*Chesapeake & Ohio R. Co.* v. *Public Service Commission of West Virginia,* 242 U.S. 603, 607-608 (1917).)

* * * * * * *

"The problems raised by the discontinuance of trains Nos. 7 and 8 cannot be resolved alone by reference to appellee's loss in their operation but depend more upon the predominantly local factor of public need for the service rendered." (*Alabama Public Service Commission* v. *Southern R. Co.,* 341 U.S. 341, 347 (1951).)

The burdens of a public utility must be viewed in light of the principle that a public utility cannot shut off all unprofitable service—it must continue to serve, even at a loss as to some operations when the public convenience and necessity do not permit the loss of the service.

[fol. 1073] A public utility such as a railroad exercises an extraordinary privilege and occupies a privileged position because of the franchise granted to it by governmental authority. Public service of the highest order is the solemn obligation and must be required of such a utility.

Questions of service and applications to abandon are not to be measured by the sole test of profit and loss. To the contrary, the first consideration should be the welfare of the patronizing public of passenger trains. Whether public convenience and necessity exist cannot turn on the question of deficits on the operation of some particular segment of a given railroad's business.

In the recent decision of Denver & Rio Grande Western Railroad Co.—discontinue passenger service— ..... I.C.C.

....., decided March 22, 1963, this Commission recognized the fact that passenger deficits are inherent in the operation of certain Mountain-Pacific roads. In that case it required one of the lines to continue to operate passenger trains found necessary to serve the public even though it was found by the Commission that such trains were incurring actual losses.

It would seem that this decision points up a contradiction inhering in the Commission's policy in passenger discontinuance cases, on the one hand, and its reliance on passenger deficit statistics in prescribing transcontinental [fol. 1074] divisions on the other. Is it not inconsistent and contrary to the act for this Commission to transfer divisional revenues from the Mountain-Pacific lines on the ground of revenue need, while it excludes from its consideration the results of passenger operations which are an important part of revenue needs of the same Mountain-Pacific railroads in providing transportation service?

Even assuming passenger deficits can lawfully be disregarded in considering revenue needs under Section 15(6) of the act, the Commission has made a sudden change or shift here from prior administrative norms or practices without any explanation. In this respect the report is deficient.

In prior freight rate cases, the Commission has expressly decided that the entire transportation operation, including the effect of passenger deficits, is to be considered in the determination of a railroad's revenue needs.

The Commission's attitude is clearly expressed in *Ex Parte No. 168, Increased Freight Rates & Charges,* 1948, 276 I.C.C. 9, 32, 34, wherein we find the following language:

> "As will be shown, the passenger service presently appears to be conducted at a substantial loss, considering the railroads as a whole. As here only freight rates and charges are in issue, the users of that service insist that they shall not be required to bear the burden of the passenger deficit, and take the position that

each branch of the service should pay its own way, or in any event, the deficit should be localized to the roads [fol. 1075] or territories in which the loss from passenger traffic is most pronounced.

"In this country, at least, it was formerly taken as all but axiomatic that each class of service, freight and passenger, should pay its own way." [Citing cases.]

* * * * * * *

"However, because of changed theories adopted by Congress in the Transportation Act, 1920, and because as a practical matter the increasing degree of unprofitableness of the passenger traffic menaced the continuity of an adequate national system of transportation, we were forced to a more comprehensive view of the question."

Further, at page 35, the Commission pronounces its position on the subject of passenger deficits in the manner following:

"These cases are typical of our more recent holdings upon this question. While we regard it as 'trite to say that each particular service, coach, sleeper, parlor car, and head end, should as nearly as may be pay its own way and return a profit' (*Eastern Passenger Fares in Coaches,* 227 I.C.C. 17, 25), and we have accepted the contention that there may be traffic that should not be burdened with a shortage of passenger service return (*Livestock, Western District Rates,* 190 I.C.C. 611, 629), yet, if passenger service inevitably and inescapably cannot bear its direct costs and its share of joint or indirect costs, we have felt compelled in a general rate case to take the passenger deficit into account in adjustment of freight rates and charges. Both the freight and passenger services are essential, and revenue losses or deficits on the one necessarily must be compensated by earnings on the other if the

carriers are to continue operations. Both may be subjected to reasonable rates and charges to produce the fair aggregate return, even though thereby a higher rate of return may be exacted from the one than from the other. (*Property Owners' Committee* v. *Chesapeake & O. Ry. Co.*, 237 I.C.C. 549, 565.) The carriers [fol. 1076] seem to have come to this conclusion in their contentions among themselves as to adjustment of their divisions. *Florida East Coast Ry.* v. *Atlantic Coast Line R. Co.*, 235 I.C.C. 211, 238; *Huntington & B.T.M.R. & Co.* v. *Pennsylvania R. Co.*, 183 I.C.C. 685."

These passenger deficits that bring about a declining aggregate return are indeed not excluded. They are considered in the justification for increased interstate freight rates.

The same reasoning we find applied in proceedings involving increases in intrastate freight rates. Here, to, the entire earnings of the carriers are relied on, albeit these earnings have been reduced by rising passenger deficits. Reliance upon passenger deficits in requiring increases in intrastate freight rates was clearly and explicitly upheld as follows in *King* v. *U.S.*, 344 U.S. 254, at 262-264, 265-266 (1952):

"In recent years, a nationwide passenger deficit has been obvious except during the peak of wartime passenger traffic. The ratio between passenger operating expense and revenue has varied in different areas but has been uniformly unfavorable to the railroads.

"Section 15a(2) of the Interstate Commerce Act and the National Transportation Policy of 1940 reflect this broad concept of the unity of the Nation's transportation system. They direct the Commission to consider, among other things, the need, in the public interest, of adequate and efficient railway transportation service and the need of revenues sufficient to sustain such service. It permeates such general revenue proceed-

ings as *Ex Parte Nos. 162 and 166, supra.* It leaves no ground for a claim that the Commission may not give weight to passenger revenue deficits in prescribing [fol. 1077] *interstate* freight rates to meet over-all revenue needs. See *United States* v. *Louisiana,* 290 U.S. 70."

* * * * * * *

"The Commission dealt with the freight and passenger revenues and properties of the Florida roads as a whole when determining the need for increases in interstate freight rates. Nothing has been demonstrated which would demand different treatment of these properties in relation to the intrastate activities."

In *Chicago, Milwaukee, St. P. & P. R. Co.* v. *Illinois,* 2 L. ed. 292, 299, the U. S. Supreme Court stated the following: "Passenger deficits have become chronic in the railroad industry and it has become necessary to make up these deficits from more remunerative services. The I.C.C. has recognized this practical reality of today's railroading and has changed its rate-fixing policy so that if interstate passenger service inevitably and inescapably cannot bear its share of joint or indirect costs, the I.C.C. feels compelled in a general rate case to take the passenger deficit into account in the adjustment of interstate freight rates and charges." (*Citing King* v. *U.S.,* 344 U.S., 254, 261.)

Total transportation operations form the basis for determining the level of freight rates. Passenger deficits are included in the total operations. So, too, in prior divisions cases, passenger deficits have not been disregarded in the consideration of relative revenue needs. Reliance has been made upon rates of return and other measures of the [fol. 1078] earnings from total transportation operations, reflecting passenger deficits. In *Official-Southern Divisions,* 287 I.C.C. 497, 505, the Commission stated:

"What we must consider under section 15(6) is 'the amount of revenue required to pay their respective

> operating expenses, taxes, and a fair return on their railroad property held for and used in the service of transportation.' *This amount is measured by net railway operating income.*" (Emphasis added.)

Net Railway Operating Income measures the earnings from all railway operations, freight and passenger. (See *Official-Southwestern Divisions,* 287 I.C.C. 553, 562-564; *Official-Western Trunk Line Divisions,* 316 I.C.C. 351, 361-362.)

The Commission decision in the instant Transcontinental Divisions cases departs abruptly from its established and accepted views. Such a departure, even where it is within the limits of the Commission's discretion, is required to be sustained by a rational explanation. The Supreme Court has so held. It set aside a Commission order under similar circumstances in *Secretary of Agriculture* v. *United States,* 347 U.S. 645, 652-654 (1954):

> "In dealing with technical and complex matters like these, the Commission must necessarily have wide discretion in formulating appropriate solutions. But we do say that while the Commission has adumbrated the reasons that commended these charges to its approval, the Commission has not adequately explained its departure from prior norms and has not sufficiently [fol. 1079] spelled out the legal basis of its decision. We do not know whether the Commission has disregarded its own findings that the unloading here is a prerequisite to delivery of the goods; or whether, in order to meet an unusual situation, the Commission has modified the normal doctrine that delivery is the responsibility of the carrier, see *New England Coal & Coke Co.* v. *Norfolk & W.R. Co.,* 33 I.C.C. 276; or whether the Commission, for a reason not made explicit, has here deemed irrelevant the prevailing rule of its prior cases that a service necessarily encompassed by the line-haul rate cannot be separately re-

stated to cover it. See e.g., Terminal Charges at Pacific Coast Ports, 255 I.C.C. 673; Unloading Lumber to New York Harbor, 256 I.C.C. 463. In short, the Commission has not explained its decision . . . ."

It is submitted that "the Commission has not adequately explained its departure from prior norms and has not sufficiently spelled out the legal basis of its decision" in its exclusion of passenger deficits when comparing revenue needs in this case. Therefore, the Commission order is not valid.

[fol. 1080]

Conclusion

For the foregoing reasons it is respectfully submitted that the Commission should Reconsider and Modify its Report and Order in these proceedings, dated March 21, 1963.

* * * * * * *

[fol. 1081]

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Docket No. 31503 (and Subs. 1-5)

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, et al.,

VS.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, et al.

TRANSCONTINENTAL DIVISIONS CASE

PETITION OF INTERVENORS FOR RECONSIDERATION OF THE COMMISSION'S ORDER OF MARCH 21, 1963

Arizona Corporation Commission, Phoenix, Arizona.
By: A. P. Buzard, Chairman.

Public Utilities Commission of Colorado, Denver, Colorado. By: Henry E. Zarlengo, Chairman.

Public Utilities Commission of Idaho, Boise, Idaho. By: Ralph H. Wicksberg, President.

Board of Railroad Commissioners of Montana, Helena, Montana. By: William P. Mufich, Counsel.

Public Service Commission of Nevada, Carson City, Nevada. By: J. G. Allard, Chairman.

State Corporation Commission of New Mexico, Santa Fe, New Mexico. By: G. Y. Fails, Chairman.

Public Utility Commissioner of Oregon, Salem, Oregon. By: Lloyd Hammel, Assistant Attorney General and Thomas W. Dench, Chief Rate Analyst.

Public Service Commission of Utah, Salt Lake City, Utah. By: Hal S. Bennett, Chairman.

Washington Utilities and Transportation Commission, John J. O'Connell, Attorney General, Olympia, Washington. By: Frank P. Hayes, Assistant Attorney General.

Dated: July 23, 1963
Due Date: July 26, 1963

[fol. 1082]

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Docket No. 31503 (and Subs. 1-5)

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, et al.,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, et al.

TRANSCONTINENTAL DIVISIONS CASE

Petition of Intervenors for Reconsideration of the Commission's Order of March 21, 1963

Pursuant to the provisions of Rule 1.101 of the General Rules of Practice, intervenor state regulatory commissions of Mountain-Pacific Territory respectfully request the Commission to reconsider its order of March 21, 1963 in this proceeding. Petitioners allege in justification therefor that the present order is (1) not consistent with the evidence and (2) does not conform to the standards set forth in Section 15(6) of the Interstate Commerce Act for the prescription of divisions of freight rates and to the requirements of Section 8(b) of the Administrative Procedures Act.

I. Preliminary Statement

By report and order entered March 21, 1963 in this proceeding the Interstate Commerce Commission would radically change the present divisions of transcontinental [fol. 1083] freight rates. The prescribed divisions are set forth in Appendices B and C to this report and order.

It is impossible to determine from the report and order the loss of revenue from transcontinental traffic to be

borne by defendants, Mountain-Pacific Lines. Commissioner Hutchison, in his dissent, stated (page 89) "although the report is silent as to the actual amount of revenue the prescribed divisions would shift from the transcontinental lines to eastern and midwestern carriers, estimates indicate the figure would exceed $50 million annually."

The state regulatory commissions of Mountain-Pacific Territory, parties to this petition, were permitted to intervene in the proceeding by order of the full Commission dated February 7, 1956. Our intervention was solely for the purpose of showing the importance to the public of Mountain-Pacific Territory of the transportation service rendered by the Mountain-Pacific Railroads.

The probable effects of the divisions prescribed by this order on the future economy and the public of Mountain-Pacific Territory is discussed elsewhere in this petition. We are concerned with the revenue effects of this order on the Mountain-Pacific railroads because of our conviction that the expanding economy of the Mountain-Pacific Territory requires in the public interest increased rather than reduced railroad transportation service and facilities for the future.

The public of these states have a vital stake in the case. [fol. 1084] We rely upon defendants to provide adequate and reliable railroad transportation service at rates which will permit the variety of commodities produced in these states to be profitably marketed east of the Rocky Mountains. Our producers must compete in those markets with producers more favorably located geographically to those markets. Our railroads must be able to provide prompt and reliable service, including suitable equipment, to handle present and future traffic. The public of these states also has an interest in the case as stockholders and investors in these companies.

We believe that the report and order herein will seriously jeopardize the ability of defendants (1) to render adequate service to the public in the future and (2) to maintain their competitive position in the transportation industry.

II. Failure of the Report to Set Forth Reasons or Basis for Prescribed Divisions

Petitioners allege that: findings 1 to 4, pages 86 and 87; Appendix B, pages 1 to 5; Appendix C, pages 1 to 5; of the report violate Section 8(b) of the Administrative Procedures Act, 5 U.S.C. Section 1007(b), because the report fails to clearly set forth the reasons or basis for the prescribed divisions.

Section 8(b) of the Administrative Procedures Act specifically provides:

> "All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, *as well as the reasons or basis therefor, upon* [fol. 1085] *all the material issues of fact, law, or discretion presented on the record;* and (2) the appropriate rule, order, sanction, relief, or denial thereof." (Italics ours)

Major findings and conclusions of the Commission, as individually discussed, are not supported by logical explanations of how the conclusion or findings were derived. The Commission also bases its findings upon (1) issues not material to the case; (2) upon which the parties have not been heard; and (3) upon which little or no evidence has been presented in the record.

Nowhere does the report disclose the revenue effects of the new divisions upon complainants or defendants. No accurate findings on this point could be made from the record. Grave error has been committed by the Commission in prescribing divisions with no evidence to show what results the order will produce upon the carriers and upon the public served by them.

While pages 79 and 80 reveal that the prescribed divisions between Eastern Territory and Mountain-Pacific Territory will increase the Eastern Lines' divisions between 24% and 45%, the report fails to indicate the changes in

divisions or revenues transferred thereunder to the Midwestern and Mountain-Pacific Lines on interterritorial traffic. On traffic moving between Midwestern-Southwestern Territory and Mountain-Pacific Territory the report concludes (page 85) that the mileage division scale shown in Appendix C "would produce moderate increases in some [fol. 1086] of the most important midwestern divisions". However, it is not possible from the report to determine how much revenue will be transferred between the Midwestern and Mountain-Pacific Lines. The public interest demands that the Mountain-Pacific and Midwestern Lines be able to compute their losses. The estimated $50,000,000 transfer of revenue under the order (page 89) is not broken down to show how much the Eastern and Midwestern Lines will gain and the Mountain-Pacific Lines will lose under the order or how the estimate was derived.

Appendix A hereto gives some examples of the tremendous changes in transcontinental divisions resulting from this report and order. Appendix A shows the change in percents and per $1,000 of gross revenue under the prescribed divisions on traffic moving between representative points in Mountain-Pacific Territory and representative points in Eastern and Midwestern Territory via some of the major routes through which transcontinental traffic is handled. Total transfer of revenue under the report cannot be found without a detailed study showing present traffic moving via these gateways.

The summary sheet of Appendix A shows that on traffic moving between Eastern Territory and Pacific Coast points the Eastern Lines will gain increased divisions averaging between 15% and 23% and to interior destinations the increases average between 23% and 40%. The Midwestern Lines' divisions on interterritorial traffic will be increased [fol. 1087] an average of 12% to 30% to Pacific Coast points and from 13% to 52% on traffic from or to the interior of Mountain-Pacific Territory. Only on traffic moving via the El Paso gateway will the Midwestern Lines lose revenue from their divisions on interterritorial traffic.

The Mountain-Pacific Lines' average losses in revenue range from 1% to 21% on traffic moving from or to the Pacific Coast and from 13% to 57% on traffic from or to interior points in Mountain-Pacific Territory. The most substantial losses of revenue to the Mountain-Pacific Lines will occur via routes operating through Denver and other Colorado gateways. The report gives no consideration to potential revenue loss under the order by individual carriers, such as the Denver & Rio Grande Western Railway, Western Pacific Railway Company or Southern Pacific Company, whose traffic moves via the Colorado Gateways.

Pages 2 through 16 of Appendix A show changes per $1,000 gross revenue and the change in percents (percentage of the total revenue) accruing to each carrier via representative routes on traffic moving between major cities in Mountain-Pacific Territory and representative cities in Eastern and Midwestern Territories. These pages bring out the differing results of the order when applied to specific gateways. Changes in division revenues via competitive gateways will obviously affect the future routing and flow of traffic to the detriment of both the public and the carriers.

[fol. 1088] In this report and order the Commission relies primarily on revenue needs of the Eastern and Midwestern Lines in justification of the prescribed divisions, yet the Commission makes no findings or conclusion as to how the prescribed divisions will improve the financial condition of complaints or impair the financial condition of the Mountain-Pacific Lines. This we believe to be in violation of the Administrative Procedures Act and interpretation thereof by the federal courts.

The Supreme Court of the United States in Burlington Truck Lines vs. United States, (1962) 371 U.S. 156, recently pointed out the responsibility of the Interstate Commerce Commission under the Administrative Procedures Act to set forth in their orders explicit findings of fact and conclusions so that it is possible to determine the reasons and basis upon which the Commission's decision is predicated.

In Boston and Maine Railroad vs. United States 208 F. Supp. 661, (affirmed by the Supreme Ct., 371 U.S. 26) (1962) involving appeal of the Interstate Commerce Commission's order in Docket 32055 (309 ICC 491) prescribing divisions of freight rates between Eastern and Southern Territories, the federal court in sustaining the Commission's order pointed out that under the Administrative Procedures Act:

> "The Commission's failure in many instances to draw a clear line of demarcation between findings of fact and summaries, analyses and discussion of the evidence has contributed heavily to the difficulty of reviewing this case. It is to be noted that the Commission is required to make not only findings that support its decision * * * but also findings that are intelligible and complete." (Page 671).

[fol. 1089] The courts' criticisms of the Commission in the above cited cases apply equally to the report and order in this case. The Commission's findings are not clear and meaningful and the Commission does not clearly explain how it reached its ultimate conclusion on several material issues.

The Commission in this order fails to state how it derived the specific increases in divisions prescribed in appendices B & C to the report. The Commission also fails to consider the potential effects of the prescribed divisions upon the future revenues of the carriers and the public served by them. These failures of the order constitute reversible error.

III. Efficiency of Operations

The Commission's Refusal to Evaluate and Consider Defendants' Evidence Respecting Efficiency of Operations and Fully Set Forth the Reasons for Their Findings Thereon Is Reversible Error.

Under Section 15(6) of the Interstate Commerce Act, the Commission in prescribing divisions of revenue be-

tween carriers is required to evaluate and give due consideration to all standards set forth therein. The first standard to be considered is *"the efficiency with which the carriers concerned are operated"*.

On page 72 of the report and order the Commission finds that "none of the contending groups is more or less efficiently operated than another". On page 59 of the report [fol. 1090] the Commission admits that in reaching their decision they discounted the importance of the criticism of past managements of the New York Central and Northwestern in the evidence before them as proof of past inefficiency.

The Commission must correct this portion of its decision and properly evaluate defendants' evidence on this issue. The record warrants a finding that the Mountain-Pacific Lines are shown by the evidence to be relatively more efficient than the lines in Eastern and Midwestern Territory.

IV. Revenue Need and Operating Costs

The Second Standard Required by Section 15(6) of the Interstate Commerce Act Is That the Commission in Prescribing Divisions Must Consider "the Amount of Revenue Required to Pay Their Respective Operating Expenses, Taxes, and a Fair Return *on Their Railway Property* Held for and Used in the Service of Transportation". In this report and order the Commission has committed several basic errors in improperly construing these provisions of the Interstate Commerce Act with respect to operating costs and revenue needs of the three principal groups of carriers.

1. *Comparative Operating Costs*

Since we have taken no position in our Brief and Exceptions to the Recommended Report of the Examiners as to the merits of the respective claims of the parties as to the cost studies of record we leave to defendants the major criticism of this section of the report. The report shows,

[fol. 1091] however, that the Commission has awarded complainants increased divisions far in excess of those which it finds justified from its analysis of the cost evidence. This is erroneous and must be corrected.

2. *Revenue Needs*

The Commission Erred in Its Findings and Conclusions as to Revenue Needs Because (A) It Failed to Consider the Revenue Effects of Its Order; (B) It Failed to Recognize as Part of the Revenue Needs of the Mountain-Pacific Lines the Necessity That These Carriers Have Adequate Funds to Meet the Economic Growth of Mountain-Pacific Territory; and (C) the Reliance by the Commission Upon Net Railway Operating Revenue From Freight Service and Upon the Passenger Deficits of Defendants as a Potential Source of Revenues. These failures constitute reversible error.

The report shows that the Commission relies preponderantly on the revenue needs of complainants in justification for the prescribed divisions. An analysis of the evidence covering revenue needs is contained on pages 50 through 70 of the report.

A. Revenue Effects of the Order

The Failure to Determine the Revenue Effects of the Prescribed Divisions Violates the Provisions of Section 15(6) of the Interstate Commerce Act.

Commissioner Bush, in his concurring opinion, page 88, adroitly states that "the objective in cases of this kind [fol. 1092] *is not to equalize fortunes* but to assure a national transportation system sound and healthy in all its parts".

Whether intended or not an analysis of the report proves that the result of the transfer of revenues under the prescribed divisions is to *"equalize the fortunes"* of the groups of carriers, and supports the position of Commissioner Freas, page 90, that "I consider it improper to *equalize*

the different fortunes of groups of carriers which are the result of economic conditions prevailing in the various localities". This is robbing Peter to pay Paul.

Unless there is a substantial reduction in the volume of traffic handled, it is not possible for defendants to offset losses in gross revenues from reduced divisions by reducing operating costs. Consequently, losses in gross revenues will be reflected entirely in reduced net railway operating income or profit.

An estimated annual revenue loss of $50,000,000 (page 89) from the prescribed divisions amounts to approximately 25% of defendants' annual average net railway operating income of $203,160,000 (page 53) for the years 1946 through 1958. The average rate of return for complainants and defendants is shown on pages 56 and 57 for the years 1946 through 1958 as follows:

	Rates of Return (percent)	
For	Book Investment	ICC Elements of Value
Eastern District, Including Pocahontas Region	3.30%	3.56%
Midwestern Lines	3.49	3.69
Transcontinental Lines	3.86	4.65

[fol. 1093] An average loss of $50,000,000 annually in net railway operating income during this period would have reduced the average rate of return of the transcontinental railroads based on Book Investment to 2.91% and on Elements of Value to 3.50% with proportionate increases in the rates of return of Eastern and Midwestern lines. There is no evaluation by the Commission of the potential effect of its report and order on the financial condition of individual railroads.

In prior divisions cases the Commission has determined the revenue effects of the prescribed divisions on the

parties. For example, in the *"New England Divisions"* case, cited in the report, the Commission found precisely the amount of revenue which it transferred, determined the benefit that a transfer of that sum would produce for the New England lines, and also measured the impact of that transfer on their connections (66 I.C.C. 196, 205-6).

In any case where the issue before the Commission is the amount of revenue which a carrier should get from one part of its business in order to insure a just contribution to its overall revenue needs, an absolute prerequisite to decision is a determination as to the amount of the overall needs and the amount of the transfer that should be made to meet those needs. This principle was plainly stated in *State of Illinois* v. *United States,* 146 F. Supp. 195 (N.D.Ill.) (1956). This evaluation must be made by the Commission in this case.

This Robin Hood approach *"to equalize fortunes"* will [fol. 1094] penalize defendants without any indication in the order of how it will improve the financial conditions of complainants, especially the railroads who need it most. This we believe to be in error and contrary to the intent of Section 15(6) of the Act.

(B). Revenue Needs of Mountain-Pacific Lines

Because of the Anticipated Economic Growth of Mountain-Pacific Territory Defendants Must Expand Their Plant and Equipment, if They Are (1) to Share in the Future Traffic of This Area and (2) to Render Adequate Service to the Public in the Future.

On pages 8 to 32 of our brief in this proceeding, we discuss in detail evidence submitted by witnesses representing the public of our states. This evidence shows the importance of the transportation services of defendants to the public of Mountain-Pacific Territory presently and for the future. In our testimony, as summarized in our brief, we show the economic growth of the Mountain-Pacific states since World War II and the anticipated future growth in

the economy of these states. The Commission recognizes the economic growth of our territory and concludes on page 51 that "the shifts in population and consequent economic changes have also had marked effects on the fortunes of the railroads".

The Commission fails, however, to recognize that with the growth of the economy of our states the Mountain-Pacific Lines are faced with increased liabilities to serve [fol. 1095] the public. It is not justice to deprive defendants of a substantial portion of their net railway operating income at the very time they must increase their services in the public interest.

In our brief, page 7, we specifically inquired of the Commission:

> "In spite of the pressing need for additional investment in equipment and transportation facilities, the *Mountain-Pacific carriers cannot look to rate increases to provide increased earnings* but instead must face further rate reductions. Where then is the money necessary to provide additional facilities, and to maintain the earnings of the Mountain-Pacific carriers to come from? With these carriers dependent for over half of their freight revenues on these transcontinental divisions, it seems only fair that the *Midwestern and Eastern connections, who participate in the transcontinental traffic without having had to make the necessary capital investments at anything approaching the same rate, should be called upon in this divisions proceeding to provide at least a modest increase in the transcontinental divisions accruing to Mountain-Pacific Lines.*" (Emphasis supplied)

The Commission refuses to answer the basic question "where are defendants in the future to derive funds to meet their common carrier liabilities to the public of Mountain-Pacific Territory". For reasons pointed out in our brief, pages 40 to 46, defendants cannot derive additional

revenue from increasing rates, but would have to reduce service to the public to offset losses of division revenues under this report.

The Commission erred in its statement on page 75 of the report that:

> "We are unable to agree with the defendants and the interveners that the public interest warrants increases in the divisions of the mountain-Pacific rail- [fol. 1096] roads in order to provide a source of investment funds required for enlarged facilities commensurate with industrial development in that region. The railroads in all sections of the country are faced with the continuing necessity of raising funds for additions and betterments and new equipment, *and we cannot recognize* any difference in the degree of this urgency among the territorial groups."

The record shows that during the past decade respondents have invested a billion and a half dollars in improvements in their plant and equipment. The Commission does not find that defendants' investments were *not necessary* or in the public interest. (pages 56 and 57)

The report does not show the far greater rate of increase in investment in transportation property made by the Mountain-Pacific compared to the Eastern and Midwestern roads (Exhibit T-314, p. 27):

Growth in Net Investment in Transportation Property (millions)

	East	Midwest	Mountain-Pacific
January 1, 1951	$10,771	$4,851	$5,760
December 31, 1955	11,425	5,301	6,561
Increase	$ 654	$ 450	$ 801
Percent Increase	6%	9%	14%

The average annual net railway operating income of the transcontinental group of carriers was $203,160,000 for the years 1946 through 1958 (page 53). Defendants' average investment of $150,000,000 during the past decade in replacement of their plant and equipment represents 74% of their $203,000,000 average net railway operating income for the same period. In spite of this tremendous investment the record shows that these carriers have not been [fol. 1097] able to expand service and replace their equipment to meet increased public demand. There are constant recurrences of car shortages in our states. An annual loss of $50,000,000 or more in gross revenues will substantially reduce funds available to the Mountain-Pacific Lines for improvement of their properties. These basic facts cannot be denied.

To deprive defendants of revenues in excess of $50,000,000 annually will deprive the public of our states of adequate common carrier railroad service for the future. The Commission erred in not considering this factor a part of the revenue needs of defendants.

(C). Passenger Deficit

The Reliance by the Commission Upon Net Railway Operating Income From Freight Service and Upon the Passenger Deficits of Defendants Is Not Justified by the Facts or the Applicable Law.

There is no material evidence in the record relating to the comparative passenger deficits of the parties and no attempt was made by any party to rely on the passenger deficit situation in justification of increased divisions. In fact the issue had not been raised at the time of the Portland, Oregon regional hearing in May, 1957, at which intervenors' evidence was submitted so we have had no opportunity to be heard on this issue. The matter did not become a material issue until the Examiners' Recommended Report was served in December, 1960.

[fol. 1098] Yet the Commission, on pages 62 through 67, compares in detail the earnings of complainants and defendants from their freight operations and losses from their passenger operations. Based upon its analysis of earnings from freight service only the Commission finds on page 67 that "the eastern railroads are in a less advantageous situation *as freight carriers* than those in the western district." (Emphasis ours.) A similar finding is reached on page 70 with respect to the Midwestern Railroads:

> "Upon all the evidence relating to revenue need, it is our view that the midwestern lines rank below the transcontinental roads in earning power as judged by statistics for the post-war period and that their prospects for sustained or increased *freight income* are less promising than those of the defendant transcontinental railroads."

On pages 65 and 66 the Commission finds that defendants' passenger deficit is the cause of their failure to earn adequate revenues from their investment in plant and equipment since World War II. The Commission's ultimate conclusion as to revenue needs, page 76, is based on "freight earnings". The foregoing findings and conclusions are in error since they are not based upon the evidence of record nor upon proper interpretation of the Interstate Commerce Act.

The Examiners first brought in issue the passenger deficit situation in answer to our inquiry as to where the Mountain-Pacific Lines could derive revenues in the future to offset lost revenues from reduced divisions. On page 31 of their Recommended Report, the Examiners stated:

> [fol. 1099] "The obvious answer to the question stated in the foregoing quotation is that *a reduction in the passenger deficit* of the mountain-Pacific lines, which would seem to be imperative sooner or later,

should help materially in furnishing funds for additions and betterments. *The interveners are in a position to assist in such a course by taking a sympathetic attitude toward discontinuance of unprofitable passenger service.*" (Emphasis supplied)

A substantial portion of our Exceptions to the Recommended Report of the Examiners filed April 5, 1961, was devoted to explaining why elimination of the theoretical passenger deficit could not be relied upon as claimed by the examiners, to produce future revenues adequate to offset defendants' losses of revenue from reduced transcontinental divisions.

In our exceptions we show what has been done by the Mountain-Pacific Railroads to reduce passenger expenses and remove unprofitable passenger train service. Our exceptions include a study prepared by the state regulatory commissions showing in detail passenger train discontinuance by defendants in each of the Mountain-Pacific states during the eleven year period 1950 to 1960. In our analysis of the passenger deficit problem since 1950 we did not find any substantial difference in the decline of railroad passenger service in the Eastern or Western District.

This record contains no evidence that the Mountain-Pacific Lines have not increased their passenger fares in proportion to their ability to maintain passenger traffic under such increased fares. We discussed in detail in our [fol. 1100] exceptions the allocation of expenses between passenger and freight service and showed that a substantial portion of the joint costs presently borne by transcontinental passenger service would be allocated to freight service if passenger service were discontinued. We urge the Commission to review our exception brief regarding the passenger deficit issue.

Section 15(6) of the Interstate Commerce Act does not differentiate between earnings from freight and passenger service. The Act requires the Commission to consider—"the amount of revenue required to pay their respective

operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation" in prescribing and determining the division of joint rates, fares, and charges.

The Supreme Court of the United States held in Baltimore and Ohio R.R. Co. vs. United States, 298 U.S. 349, 360 (1936); 56 S.Ct. 797, 804; 80 L. ed. 1209, 1219, that this provision of the Interstate Commerce Act must be construed to apply to *all* property held for and used in the service of transportation, including, of course, property held for and used in the service of transporting passengers:

> "The language, 'property held for and used in the service of transportation', is broad enough to include all carrier property. It requires no discussion to demonstrate that Section 15(6) authorizes the Commission to take into account and give due weight to revenues from all transportation service, the operating expenses and taxes chargeable to the same and the amounts available as compensation for the use of all carrier property." *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349, 360 (1936).

[fol. 1101] As one of the items specified in Section 15(6) of the Interstate Commerce Act the revenue needs of each carrier of *all its property* held or used in the service of transportation are entitled to consideration as an absolute prerequisite to any Commission action changing divisions. In Brimstone R. Co. v. United States, 276 U.S. 104, 117 (1928); 72 L. ed. 487 the court held:

> "The record discloses that before making the challenged order the Commission failed to consider the items definitely specified by Section 15(6). And it must be annulled."

The important point is that under Section 15(6) no fragmentation of the carriers into freight carriers and passenger carriers is permitted in consideration of relative

revenue needs. In this respect, the section adopts the established principle that a public utility cannot discontinue a part of its service merely because that part becomes unprofitable. This principle has consistently been applied to passenger train discontinuance cases by the Supreme Court:

> "One of the duties of a railroad company doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment of the powers and privileges granted by the State and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided merely because it will be attended by some pecuniary loss. *Atlantic Coast Line Railroad Co.* v. *North Carolina Corporation Commission,* 260 U.S. 1, 26; *Missouri Pacific Ry. Co.* v. *Kansas,* 216 U.S. 262, 279; *Oregon Railroad & Navigation Co.* v. *Fairchild,* 224 U.S. 510, 529; *Chicago, Burlington & Quincy R.R. Co.* v. *Wisconsin Railroad Commission,* 237 U.S. 220, 229. That there will be such a loss is, of course, a circumstance to be considered in passing [fol. 1102] upon the reasonableness of the order, but it is not the only one. The nature and extent of the carrier's business, its productiveness, the character of service required, the public need for it, and its effect upon the service already being rendered, are also to be considered. Cases *supra.*" (*Chesapeake & Ohio Ry. Co.* v. *Public Service Commission of the state of West Virginia,* 242 U.S. 603, 607-608 (1917); 37 S. Ct. 234; 61 L. ed. 520.)

In our opinion, the passenger deficits of the Mountain-Pacific Lines are burdens incurred in the discharge of defendants' public liability as common carriers and must under Section 15(6) be taken into account in any consideration of the revenue needs of the carriers.

The Commission, in its numerous orders approving increases in general freight rates, under Section 15(a)(2) of

the Act has consistently held that the railroads are entitled to revenues adequate to cover their operating costs and provide a profit on their entire operations, including revenues to offset passenger deficits. (Ex Parte 168, Increased Freight Rates and Charges, 1948, 276 ICC 9.)

In *King* v. *United States,* 343 U.S. 254, 263-4 (1952); 73 S. Ct. 259; 97 L. ed. 301, the United States Supreme Court found that the Commission's reliance upon passenger deficits in requiring increases in intrastate freight rates was justified.

> "Section 15a(2) of the Interstate Commerce Act and the National Transportation Policy of 1940 reflect this broad concept of the unity of the Nation's transportation system. They direct the Commission to consider, among other things, the need, in the public interest, of adequate and efficient railway transportation service and the need of revenues sufficient to sustain such service. It permeates such general revenue proceedings [fol. 1103] as *Ex Parte Nos. 162 and 166, supra.* It leaves no ground for a claim that the Commission may not give weight to passenger revenue deficits in prescribing *interstate* freight rates to meet over-all revenue needs. See *United States* v. *Louisiana,* 290 U.S. 70."

Since the Commission and the courts have consistently upheld the principle that total transportation operations, *including passenger deficits,* form the basis for determining the level of freight rates, why does the Commission now change its approach in determining divisions of freight rates? There is no explanation of such disregard of passenger deficits to be found in any prior divisions cases and there is no precedent for the consideration of passenger deficits in determining relative revenue needs in divisions cases. In *Official Southern Divisions,* 287 ICC 497 (1953) the Commission stated on page 505:

> "What we must consider under section 15(6) is 'the amount of revenue required to pay their respective op-

erating expenses, taxes, and a fair return on their railroad property held for and used in the service of transportation.' *This amount is measured by net railway operating income.*" (Emphasis supplied.)

Net railway operating income as referred to herein measures the earnings from all railway operations, freight and passenger. This principle was observed by the Commission in many prior divisions cases: Official-Western Trunk Line Divisions, 316 ICC 351, 361-362 (1962); Official-Southwestern Divisions, 287 ICC 553, 562-564 (1953).

The Commission does not explain in this report why it departed from its prior practices in determining divisions based upon total transportation operations, which reflect [fol. 1104] passenger deficits, in prescribing the divisions in this proceeding. The Commission erred in relying upon net railway operating income from freight service and upon the passenger deficits in determining the revenue needs of complainants and defendants.

V. Importance of Defendants' Service to the Public

The Third Standard Required by Section 15(6) of the Interstate Commerce Act Is That the Commission, in Prescribing Divisions Shall Give Due Consideration to "the Importance to the Public of the Transportation Services of Such Carriers".

We take exception to the Commission's findings and conclusion on Page 74 of the report and order that:

> "In our opinion, there are no differences in the importance to the public attributable to the 3 contending groups of carriers."

A brief discussion of the position of the parties on this issue is contained on pages 72 to 74 of the report and order.

The Commission, in the report, *has gone beyond the evidence of record to reach its ultimate conclusion.* Intervenor state regulatory commissions of Mountain-Pacific Territory

presented the *only evidence* of record on behalf of the public in this proceeding. No evidence was produced on behalf of the public of other territories. Our participation in this proceeding has been solely to show: (1) the importance to the public of the transportation services provided by the Mountain-Pacific railroads and (2) the effect of the order to be made in this proceeding not upon defendants as such [fol. 1105] but in its effect on the public dependent upon their services and upon the economy of our states.

Any transfer of millions of dollars from the few Mountain-Pacific Lines to the numerous Eastern and Midwestern Lines is a matter of serious public concern. The report shows, pages 21 and 22, that (1) 6% of the gross freight revenues of complainant Eastern Lines; (2) 15% of the gross revenues of the Midwestern Lines; and (3) 47% of the gross freight revenues of the Mountain-Pacific lines is derived from their divisions of transcontinental revenue. Since the Eastern and Midwestern Lines rely to a much lesser extent on divisions from transcontinental traffic than the Mountain-Pacific Lines for their total revenues, the increased divisions prescribed for the benefit of the Eastern and Midwestern Lines *will not* substantially improve their financial condition but will seriously impair the financial condition of defendants. The public of Mountain-Pacific Territory has much more to lose as a result of this order than the public of other territories could possibly gain therefrom.

Our brief is devoted to an analysis of the evidence submitted by witnesses on behalf of the public of Mountain-Pacific Territory. This evidence shows the economic growth both in population and industrial expansion in the Mountain-Pacific states since World War II and that the economy of the Mountain-Pacific states is largely tied to the production of agricultural commodities, forest products, and prod-[fol. 1106] ucts of mines which have been and for the future must be marketed in substantial volume in the Midwest and East. Our producers are dependent upon adequate railroad services to market these commodities because of

the long hauls involved. Defendants must maintain realistic market competitive rates on these basic commodities if they are to be produced and shipped from our states in the future.

Our evidence has not been rebutted but has been largely ignored by the Commission in its report and order herein. The Commission recognizes (pages 50 to 52 of the report) the economic growth of the Mountain-Pacific Territory and the increased traffic which this growth has produced for all railroads, both complainants and defendants, but fails to consider the increased liabilities placed upon defendants as the originating carriers to provide adequate service to the public in the future.

The Fourth Standard Required by Section 15(6) of the Interstate Commerce Act Is That the Commission in Prescribing Divisions Consider "Also Whether Any Particular Participating Carrier Is an Originating, Intermediate, or Delivering Line, . . .".

Evidence relating to the problems faced by defendants in providing adequate service and car supply to shippers of Mountain-Pacific Territory is discussed on pages 32 through 40 of our brief. The bulk of the eastbound traffic handled by defendants originates on branch lines and requires extensive local service. Because of the seasonal nature of a sub- [fol. 1107] stantial part of the eastbound traffic, car shortages frequently occur during the heavy summer shipping season. Frequently 50% of the car supply needed by shippers in our states must be hauled empty for over 2,000 miles from the Midwest at substantial expense to defendants. Car shortages reflect the inability of defendants to meet the expanding needs of this area. No comparable car supply problems must be met by Eastern and Midwest lines.

Although the Mountain-Pacific Lines car building program has exceeded that of lines in other territories, in times of car shortage our lines normally have less than 100% of ownership on line.

Testimony was offered by both intervenors and defendants relating to the adequacy of service to the public of

this territory. In its report and order the Commission largely ignores the evidence respecting defendants' obligations to the public as originating carriers. The only recognition given to differences in services afforded to the public are those reflected in the cost studies of record.

On page 65 of the report and order, the Commission concludes that the rate holddowns in the general ex parte rate increase cases of the 1950's have not adversely affected defendants' revenues. Because of continuous and substantial rate reductions on transcontinental traffic since the record was closed in this proceeding, this situation has changed and *defendants cannot hope to increase their* [fol. 1108] *freight rates to produce revenues lost from reduced divisions from this report and order.* Competition from other modes of transportation, especially private and unregulated carriage, as well as market competitive problems of shippers prohibit the carriers from raising the general level of their rates.

If this order becomes effective the major recourse left to defendants is to reduce their services to the public in the future. Does the Commission expect defendants to (1) reduce their services to the public; (2) reduce their funds for maintenance and replacement of their plant and equipment; and (3) still meet the public need for their service? With forced reductions in service and improvement in properties, how does the Commission expect defendants to meet intermodal competition for the available traffic?

The Commission's finding on page 74 that "there is no difference in the importance to the public of the service of the three contending groups of carriers", is not consistent with the evidence and the Commission's failure to issue explicit findings on these material issues violates Section 8(b) of the Administrative Procedures Act.

We are convinced that the public of Mountain-Pacific Territory will ultimately bear the burden of defendants lost revenues under this order through reduced service, increased rates or both.

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BEFORE THE

INTERSTATE COMMERCE COMMISSION

No. 31503[1]

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY ET AL. v. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

1. Divisions of joint rail rates between eastern territory and transcontinental territory, found to be unjust, unreasonable, and inequitable. Lawful divisions prescribed.
2. Divisions of joint rail rates between midwestern territory and transcontinental territory, including subdivisions of joint rates between eastern territory and transcontinental territory for transportation in midwestern territory, found to be unjust, unreasonable, and inequitable. Lawful divisions prescribed.

Joseph F. Eshelman, W. T. Pierson, M. C. Smith, Jr., A. C. Armstrong, R. G. Bleakney, Jr., Robert D. Brooks, B. T. Buck, J. Raymond Clark, J. T. Clark, Robert B. Claytor, R. E. Costello, Eugene S. Davis, K. A. Dobbins, A. P. Donadio, J. W. Grady, J. W. Hanifin, Allen Lesley, K. H. Lundmark, Robert H. Pratt, Richard H. Stokes, and *Frank F. Vesper* for complainants in No. 31503.

Bryce L. Hamilton, Nye F. Morehouse, Nuel D. Belnap, John W. Adams, Jr., Thomas M. Beckley, Martin L. Cassell, Charles H. Clay, Richard M. Freeman, George W. Holmes, John E. McCullough, Richard Musenbrock, William A. Thie, and *Erle J. Zoll, Jr.*, for complainants in No. 31503 (Sub-No. 1).

J. A. Gillen for complainants in No. 31503 (Sub-No. 2). *R. K. Merrill* for complainant in No. 31503 (Sub-No. 3). *E. R. Leigh* for complainant in No. 31503 (Sub-No. 4). *Arthur J. Dixon* for

[1]This report embraces also No. 31503 (Sub-No. 1), Ahnapee & Western Railway Company et al. *v.* Abilene & Southern Railway Company et al.; No. 31503 (Sub-No. 2), Chicago, Burlington & Quincy Railroad Company et al. *v.* Abilene & Southern Railway Company et al.; No. 31503 (Sub-No. 3), Chicago, Milwaukee, St. Paul & Pacific Railroad Company *v.* Same; No. 31503 (Sub-No. 4), Louisville & Nashville Railroad Company *v.* Akron, Canton & Youngstown Railroad Company et al.; and No. 31503 (Sub-No. 5), Cincinnati, New Orleans & Texas Pacific Railway Company *v.* Same.

complainant in No. 31503 (Sub-No. 5). *Toll R. Ware* for a cross-complainant in No. 31503. *Douglas F. Smith, Howard J. Triens, S. R. Brittingham, Jr., R. Granville Curry, Frank S. Farrell, Lawrence W. Hobbs, Thormund A. Miller, Ernest Porter, Howard V. Rhedin, L. E. Torinus, Jr.,* and *E. L. Van Dellen* for transcontinental defendants.

W. C. Dowdy, Jr., M. D. Sampels, Gerry N. Wren, William R. McDowell, and *Clyde W. Fiddes* for other defendants.

Thomas W. Dench, Joseph F. Nigro, A. O. Sheldon, James A. Robischon, William P. Mufich, J. G. Allard, Ingram B. Pickett, Lloyd Hammel, Hal S. Bennett, John J. O'Connell, Frank P. Hayes, William M. Bennett, Roderick B. Cassidy, J. Thomason Phelps, and *Cyril M. Saroyan* for interveners.

REPORT OF THE COMMISSION—Decided March 21, 1963

HERRING, *Commissioner:*

Each of the three major groups of contending parties filed exceptions to the recommended report and order of the examiners and replied to the others' exceptions. The interveners and The Texas and Pacific Railway Company are also exceptants. We have heard oral argument. Our conclusions differ to some extent from those of the examiners. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

These proceedings, consisting of a principal complaint and five others subnumbered, as well as certain cross-complaints, present the question of the lawfulness of divisions of joint rates for railroad transportation between points in mountain-Pacific territory and points in the rest of the conterminous United States, except southern territory. There are three principal groups of litigants with mutual adverse interests; namely, eastern railroads, midwestern railroads, and transcontinental railroads.

The eastern lines (sometimes hereinafter called the complainants) include most of the rail carriers of all classes assigned for statistical purposes to the eastern district and the Pocahontas region. The midwestern lines (complainants in one of the cases and defendants in others) are rail carriers which operate solely or mainly in that part of western territory which is east of the Rocky Mountains, the class I railroads in this group being the following: Chicago and North Western Railway Company; Chicago Great Western Railway Company; Chicago, Rock Island

and Pacific Railroad Company; Elgin, Joliet and Eastern Railway Company; Green Bay and Western Railroad Company; Gulf, Mobile and Ohio Railroad Company; Illionis Central Railroad Company; Kansas, Oklahoma & Gulf Railway Company; Lake Superior & Ishpeming Railroad Company; Minneapolis, Northfield and Southern Railway; Soo Line Railroad Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company; and St. Louis-San Francisco Railway Company. The transcontinental lines (sometimes hereinafter referred to as the defendants) are railroads of all classes which operate wholly or partly west of the Rocky Mountains, including the following class I carriers: The Atchison, Topeka and Santa Fe Railway Company and its Texas subsidiaries; The Denver and Rio Grande Western Railroad Company; Great Northern Railway Company; Northern Pacific Railway Company; Southern Pacific Company and certain of its subsidiaries (not including the St. Louis Southwestern Railway Company); Spokane International Railroad Company; Spokane, Portland and Seattle Railway Company; Union Pacific Railroad Company; and The Western Pacific Railroad Company and its subsidiaries.[2]

The State regulatory commissions of 10 of the 11 Mountain-Pacific States[3] were permitted to intervene in support of the defendants. One of these, the Wyoming Public Service Commission, later declared its neutrality. The Arizona Corporation Commission did not intervene.

Hearings extended intermittently from April 26, 1955, to December 11, 1959. Direct testimony was principally in writing contained in the exhibits, of which there were 834. Oral testimony, mainly on cross-examination, made up the transcript of 11,242 pages. Briefs filed by the 3 groups of principal rail carriers covered 1,145 pages plus voluminous appendixes.

No. 31503 and Sub-Nos. 4 and 5.— The principal complaint was filed on April 5, 1954, by the eastern lines, and the defendants therein are chiefly the western rail carriers whose lines connect directly or indirectly with those of the complainants. The divisions assailed in this complaint as unreasonable, inequitable and unduly prejudicial and preferential under section 15(6) of the Interstate Commerce Act are those of joint rates between east-

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[2]For this note and succeeding ones see appendix A.

[3]See appendix A.

ern territory and points in the 11 Mountain-Pacific States, subject to unimportant exceptions listed in note 4.[4]

The transcontinental lines filed an answer to this complaint combined with a cross-complaint in which they allege that the divisions assailed in the principal complaint are unjust, inequitable, and unduly prejudicial to themselves. Separate answers and cross-complaints similar to those of the transcontinental defendants were also filed by the Chicago, Burlington & Quincy Railroad Company and its subsidiaries, and also by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

The complaints in Sub-Nos. 4 and 5 were filed by the Louisville and Nashville Railroad Company and the Southern Railway Company and a subsidiary, which operate in part between Ohio River cities and East St. Louis, Ill., and therefore have an interest in the divisions involved in the principal complaint. They attach those divisions on the same grounds relied upon in that complaint.

The Missouri-Illinois Railroad Company, assigned to the eastern district for statistical purposes, named as a defendant in No. 31503, with its answer filed a cross-complaint against all other defendants, which in practical effect makes it a cocomplainant in that case. The transcontinental defendants responded to that cross-complaint with one of their own and also filed cross-complaints in Sub-Nos. 4 and 5.

Sub-Nos. 1, 2, and 3.—The complaint in Sub-No. 1 ranks with No. 31503 as one of the two major components of this litigation. It was filed by the midwestern lines on June 3, 1954, naming as defendants the eastern and the transcontinental lines. Therein the midwestern lines assail as unreasonable, inequitable, and unduly prejudicial their divisions of (1) joint rates between eastern territory and that part of mountain-Pacific territory known as transcontinental territory as to which they perform intermediate service, and (2) joint rates between transcontinental territory and midwestern territory.[5]

In Sub-Nos. 2 and 3 the Burlington and the Milwaukee, respectively, and certain of their subsidiaries allege that they participate in the joint rates and transportation involved in Sub-No. 1, and ask that they be granted the same relief as may be accorded the complainants in that docket. The transcontinental defendants are also cross-complainants in Sub-No. 1.

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[4]See appendix A.

[5]See appendix A.

Traffic between eastern and mountain Pacific territories. – For the purpose of estimating the amount of revenue produced by the rates subject to the divisions here in issue, the parties made traffic studies based on actual movements in 1953 and 1955. The eastern lines undertook to measure all carload traffic between eastern and mountain-Pacific territories covered by interline settlements in October 1953. The defendants applied a sampling process to abstracts of waybills of carload shipments in 1953 and 1955. Certain other differences in the scope of these studies are of little practical imporance. As a whole, the studies indicate that, if 1953 and 1955 may be considered representative years, the traffic between these territories amounts to an annual volume of 910,000 carloads or 22.9 million tons, and yields about $890 million in annual revenue. These figures do not include less-than-carload traffic, which equals about 1.5 percent of the carload tonnage. Eastbound traffic predominates, accounting for 63 percent of the carloads, 70 percent of the tons, and 56 percent of the total revenue.

The primary commodity classifications of the carload traffic are represented by the following approximate percentages:

Classification	Cars	Tons	Revenue
	percent	*percent*	*percent*
Products of agriculture	26	19	19
Animals and products thereof	1	1	1
Products of mines	3	4	2
Products of forests	22	29	20
Manufactures and miscellaneous	44	45	55
Forwarders' traffic	4	2	3
	100	100	100

Although the parties differ as to the proper method of estimating representative average hauls within the respective territories, it is fair conclusion that the average movement in eastern territory is 600 miles and in western territory 2,000 miles, based on short-line distances. From this it would appear that the complainants perform approximately 23 percent of the total service, measured by short-line ton-miles. The same percentage represents their share of the joint revenue as indicated by the defendants' traffic studies, the shares of the midwestern lines and the defendants being 15 percent and 62 percent, respectively. The shares of individual carriers in the group totals as estimated by the defendants for 1953 are shown below:

Complainants

	Revenue (000)	Percent
NYC	$40,778	21.0
Penn	39 703	20.5
Erie	18 047	9.3
Wabash	17,884	9.2
B&O	17 846	9.2
NYC&StL	15,308	7.9
C&O	9,248	4 8
NYNH&H	3,699	1.9
LV	2,810	1.4
DL&W	2 253	1.2
B&M	1,726	.9
Rdg	1,442	.7
N&W	1.017	.5
C&EI	957	.5
Others	21,279	11.0
Total	193,997	100.0

Midwestern lines

	Revenue (000)	Percent
CRI&P	$21,601	17.2
CB&Q	19,446	15.5
C&NW	15,883	12.7
MoPac	13,809	11.0
T&NO	10,327	8.2
StLSW	9,506	7.6
IC	6,290	5.0
T&P	5,426	4.3
CGW	3,633	2.9
StLSF	3,351	2.7
M&StL	2,063	1.7
GM&O	1,737	1.4
MKT	1,717	1.4
GB&W	544	.4
Others	9,984	8.0
Total	125,319	100.0

Defendants

	Revenue (000)	Percent
AT&SF	$139,803	27.0
UP	130,200	25.0
SP	118,570	22.9
GN	37,036	7.1
NP	36,176	7.0
D&RGW	19,416	3.7
WP	12,774	2.5
CMStP&P	7,669	1.5
Others	17,196	3.3
Total	518,840	100.0

The foregoing figures for the defendants reflect an understatement as the showing for the CMStP&P is incomplete.

The great majority of cars included in the studies were interchanged between eastern and western lines at Chicago, Ill., St. Louis, Mo. (including East St. Louis, Ill.), and Peoria, Ill. The Chicago interchange was over 60 percent and as much as 64 percent, including certain other junctions in the Chicago area. That at St. Louis was at least 18 percent and at Peoria 3 percent (increased to 7 percent with the addition of other interior Illinois cities). About 2.6 percent moved by car ferry across Lake Michigan. There was a negligible movement of about 0.3 percent or less through southern territory. A fairly substantial number, 7 or 8 percent, were interchanged by the Wabash at Kansas City, Mo., and other midwestern points.

About 27 percent of the traffic received a one-line haul west of the interchange points. Principally, these were movements over the AT&SF and the CMStP&P, but it appears logical also here to take account of the CB&Q, a subsidiary of the GN and the NP, and the StLSW and the T&NO, which are parts of the SP system.

The traffic in which the midwestern lines participate is interchanged between them and the defendants largely at Council Bluffs, Iowa (including Omaha, Nebr.), Kansas City, Mo.-Kans., El Paso, Tex., the Twin Cities (Minnesota Transfer, Minneapolis, and St. Paul, Minn.), and Colorado junctions (chiefly Denver and Pueblo). The defendants' study shows that average western hauls of this traffic in 1953 were 548 miles over midwestern lines and 1,666 miles over transcontinental lines. The study of the midwestern lines for that year shows an average haul of 702 miles for them and 1,603 miles for transcontinental lines.

The movements to and from the subdivisions of eastern territory were represented by the following percentages of total tons: central, 55.1; trunkline, 35.5; New England, 9.4. The revenue percentages were about the same. From the defendants' 1953 study it appears that about 36 percent of the cars originated or terminated in the metropolitan districts of the four major Pacific ports: Seattle, Wash., Portland, Oreg., and San Francisco and Los Angeles, Calif.

More than 90 percent of the movement between eastern and mountain-Pacific territories is in boxcars and refrigerator cars. The corresponding percentage for the more diversified traffic to and from midwestern territory is 82 percent. The percentages for the various types of equipment are shown in the following table:

Type of car	Between mountain Pacific territory and—	
	Eastern territory	Midwestern territory
	percent	*percent*
Box	61.27	60.75
Flat	2.38	8.10
Stock	.14	3.78
Gondola or hopper	4.96	7.47
Tank	1.35	3.60
Refrigerator	29.84	21.21
Special	.06	.09
	100.00	100.00

Traffic between transcontinental and midwest territories.—Because of differences in the scope of the traffic studies of the defendants and the midwestern lines, it is impossible to estimate closely the volume of movement and revenue involved in Sub-No. 1. The midwestern study indicates a movement of 330,000 cars between these territories in 1935 and a total revenue of $264.6 million. The broader study of the defendants includes the intermountain region not covered by this complaint and railroads which are not complainants therein. It shows a movement of 787,549 cars in 1953 and total revenue of $634.8 million. It appears from the two studies that the directional movements were about 60 percent eastbound and 40 percent westbound.

The midwestern study shows the following distribution of volume and revenue among the primary commodity classes:

Class	Cars	Revenue
	Percent	*Percent*
Products of agriculture	18.5	15.6
Animals and products	6.9	5.0
Products of mines	6.4	5.0
Products of forests	30.3	28.7
Manufactures and miscellaneous	34.5	43.3
Forwarder traffic	3.4	2.4
	100.0	100.0

The most important points of interchange between the defendants and the midwestern lines are (in the order of importance) Kansas City, Council Bluffs, El Paso, Twin Cities, and Colorado Junctions. According to the midwestern lines' study the average actual haul per car for them on this traffic was 695 miles and for the defendants, 1,583 miles. The revenue was divided 26.58 percent to the midwestern lines and 73.42 percent to the defendants. The average actual hauls shown in the defendants' study were 620 miles for the

midwestern lines and 1,488 miles for the defendants, and the respective shares of revenue were 25.9 percent for the former and 74.1 percent for the latter.

The revenue interests of individual carriers in the midwestern-mountain-Pacific traffic, according to the defendants' study, are shown below.

Defendants

	Revenue (000)	Percent
UP	$129,592	27.6
SP	107,873	22.9
AT&SF	75,913	16.1
GN	38,649	8.2
NP	37,842	8.0
D&RGW	29,395	6.3
CM&StP	16,592	3.5
WP	15,759	3.4
Others	18,714	4.0
	470,329	100.0

Midwestern lines

	Revenue (000)	Percent
CB&Q	$37,083	23.1
CRI&P	22,794	14.2
C&NW	16,185	10.1
MP	16,019	10.0
T&P	10,915	6.8
T&NO	7,799	4.9
StLSF	5,631	3.5
IC	4,890	3.1
MKT	4,375	2.7
StLSW	3,448	2.2
CGW	2,087	1.3
GM&O	1,627	1.0
M&StL	1,073	0.7
GB&W	105	0.1
Others	26,254	16.3
	160,285	100.0

For the purpose of these proceedings 3 subdivisions of midwestern territory have been designated, as follows: Midwest east—Iowa, Wisconsin, the Upper Peninsula of Michigan, southeastern Minnesota, northwestern Illinois, and northern Missouri; Midwest southwest—Arkansas, Louisiana, Oklahoma, Texas, southern Missouri, and eastern New Mexico; and Midwest northwest—Kansas, Nebraska, South Dakota, southwestern Minnesota, and eastern Colorado. The percentages of total movement to and from these subdivisions were, east 60 percent, southwest 33 percent, and northwest 7 percent.

The present divisions and their history.– The transcontinental joint-rate structure is the oldest in the United States. The joint rates between the Pacific coast and midwestern territory date from 1874, 5 years after the completion of the first transcontinental rail route. Those between official territory and the Pacific coast were established in 1887.

For most of that time the divisions of these rates have been a source of recurring controversy between the defendants, on the one hand, and the midwestern lines and the complainants, on the other. The earliest divisions were based upon some form of constructive mileage prorate in which the factors for distances west of the Missouri River were 150 percent of actual distances and those east thereof were actual distances. Because of their long hauls this basis was highly favorable to the defendants[6], who also contended that their distance inflation was necessary to compensate them for adverse mountain grades and light density of population and traffic. These views have always been dominant in the thinking of the defendants and are reflected in their contentions here.

There were numerous changes of a minor nature in the divisions of the rates to and from official territory between 1887 and 1921. During much of that period the eastern lines' divisions of rates to and from New York City and other points on the Atlantic seaboard were 25 percent (via Chicago), 27.5 percent (via Peoria), and 29 percent (via St. Louis). How these divisions were arrived at is not known. It may be only a coincidence that the Chicago division was equivalent to a constructive mileage prorate with a western inflation of 25 percent.

In 1922, the complainants and the defendants entered into a formal agreement concerning the divisions of the eastern transcontinental rates, as well as the measure of some of the rates. The eastern shares were increased but in such slight amounts, in our opinion, as not to support the contention of the defendants that they were forced to yield to the superior bargaining power of the complainants. The eastern divisions established by that agreement and now in effect are shown below:

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[6]See appendix A.

Territorial group	Divisions east of –		
	Chicago	Peoria	St. Louis
	Percent	*Percent*	*Percent*
New England-seaboard	27.5	31	31.5
Trunkline interior (Syracuse, N. Y.)	25	28.5	29
Bessemer, Pa.	18	21.5	21.5
Buffalo-Pittsburgh	16.5	20	20
Cincinnati-Detroit (northern)	16	19.5	19.5
Cincinnati-Detroit (southern)	13	16.5	16.5

The above divisions are subject to certain maxima which need not be specified here. They apply generally on all traffic. There are certain special divisions on lumber to central territory which are usually higher than the general percentages. To the remainder of official territory, special divisions apply only on rough lumber. On fresh fruits and vegetables to New England and New York City pier stations, a deduction of about 6 cents per 100 pounds before prorating accrues to the eastern lines as a result of the decision in *Erie R. Co.* v. *Alabama & v. Ry. Co.*, 98 I.C.C. 268. Thereby, for example, the complainants receive 29.3 percent of the rate on lettuce from the Pacific coast to New York City, instead of the general percentage of 27.5 percent.

The percentages of the defendants from eastern-transcontinental rates to and from such points as Phoenix, Ariz., Spokane, Wash., and Reno, Nev., are the same as those of the rates to and from the Pacific ports. Apparently all of transcontinental traffic is thus blanketed. Consequently, the revenue received by the defendants from shipments to or from the intermediate territory is relatively greater than the amounts which they receive on traffic to or from the port districts. Spokane, for example, is 295 miles east of Seattle, but the defendants' percentage of rates on Spokane traffic is the same as that on Seattle traffic. That percentage, applied to rates to and from New York City via Chicago and the Twin Cities, is 60.2 for the service to and from the latter point. The difference of 295 miles before mentioned is 17 percent of the distance from the Twin Cities to Seattle and 7 percent of the distance from New York City to that point.

Since the preponderance of the midwest-transcontinental movement is to and from midwest-east territory, as before pointed out, the divisions received by the midwestern lines for their relatively short hauls between the Missouri River terminals and the Twin Cities, on the one hand, and Chicago, St. Louis, and

other intermediate points, on the other hand, have long been a source of dissatisfaction to the midwestern lines. At the time when divisional controversies could only be settled by agreement, the defendants were able to prevail on the midwestern lines to accept their time-honored constructive mileage prorate with the 50-percent inflation of the defendants' distances. Under this method the rates between transcontinental territory and Chicago were divided by apportioning 15 percent for the haul between the Missouri River or the Twin Cities and Chicago, and 11 percent between the Missouri River and St. Louis.

In 1923 the Commission on its own initiative instituted an investigation of the lawfulness of divisions of railroad rates in the western district in docket No. 15234. There were hearings in that proceeding concerning the reasonableness of the transcontinental-midwest divisions, but before submittal of the issues to the Commission for determination the two contending groups reached an agreement, effective July 1, 1925, under which the midwest divisions were generally increased 10 percent, yielding about $3 million additional revenue to the midwestern lines. This agreement had the effect, among other things, of raising the midwest Chicago division of 15 percent before mentioned to 16.5 percent and the St. Louis division of 11 percent to 12.1 percent.

Following that action the investigation in No. 15234 was not discontinued, however, and in 1929 the Commission set it for further hearing concerning the transcontinental-midwest divisions. A decision on the further hearing was rendered in 1934, *Divisions of Freight Rates*, 203 I.C.C. 299, in which, after referring to some shortcomings in the evidence, the Commission stated its conclusions, at page 335, as follows:

> However, this case must be decided on the basis of the evidence of record, voluminous but most unsatisfactory; and there is no other way of deciding it than by the exercise of general judgment after consideration of this evidence, such as it is. Upon consideration of all the evidence of record, we are unable to find that the divisions of the transcontinental rates are unlawful.

Again, in 1940, the Commission reopened No. 15234 for the purpose of again considering the transcontinental-midwest divisions, but after the start of the further hearings war conditions made further consideration of the question impracticable and No. 15234 was later discontinued "without prejudice."

In describing the divisions which resulted from the 1925 agreement the Commission in its 1934 decision said that "on the

whole they hapen to be slightly less than would result from a weighted-average mileage prorate in which actual distances east of the gateways are used in connection with a constructive distance of 1.25 miles for each mile west thereof." The defendants' 1953 traffic study indicates that, similarly measured, the average inflation west of the gateways would now be 19 percent. In some instances, however, the defendants' divisions are less than they would be under a straight mileage prorate. For example, the divisions of rates between Dallas, Tex., and Seattle via Kansas City are 30 percent south and 70 percent west of the interchange point, the respective distances being 473 miles and 1,906 miles. A mileage prorate would produce percentages of 20.3 south and 79.7 west.

Like the official-transcontinental divisions, the midwestern-transcontinental divisions are blanketed over all of transcontinental territory. Accordingly, for example, on a shipment from Chicago to Boise, Idaho, via Council Bluffs the Union Pacific receives the same division of 83.5 percent as it receives on a shipment to Seattle, 482 miles farther. This makes the Boise divisions equivalent to those which would result from a constructive mileage prorate using a constructive distance of 1.85 miles for each actual mile west of Council Bluffs.

The midwestern-transcontinental divisions of rates to and from Chicago, St. Louis, and other points of interchange with eastern lines are also used in subdividing the western shares of the official-transcontinental rates. Thus, the western division of 72.5 percent of the rates between New York City and Pacific ports is subdivided by allowing the midwestern lines for the service between Council Bluffs and Chicago 12 percent (16.5 percent of 72.5 percent) and the defendants 60.5 percent (83.5 percent of 72.5 percent). When the movement is via St. Louis and Kansas City, for the haul between those points the midwestern lines receive 8.3 percent (12.1 percent of 68.5 percent) and the defendants 60.2 percent (87.9 percent of 68.5 percent).

The divisions of joint rates to and from Montana points via northern gateways do not conform to any uniform pattern, and in some instances the general basis is in dispute. It is therefore not feasible to describe them here in a helpful manner.

Relative Cost of Service

In one of the first major proceedings involving divisions after the enactment of section 15(6) in 1920, *New England Divisions*, 66

I.C.C. 196, 199, (1922), the Commission made the following statement, which has been frequently quoted:

> Summing up this phase of the matter, we are of the opinion that our power over divisions is founded upon the public interest; that the carriers are mutually dependent parts of the transportation system; that the public interest requires that all essential parts be maintained, so far as possible, in effective working condition; that the relative amount and cost under economical and efficient management of the service rendered is a prime factor in determining the fair and equitable share of joint revenue which each carrier shall receive; and that included in such cost is a due proportion of the burden of maintaining the financial integrity and credit of the carrier.

At that time and for some years later ascertainment of relative cost was difficult because sound methods of such ascertainment were lacking. Recognition of the significance of cost in prescribing comprehensive rate structures, such as those of class rates, when comparative transportation conditions in two or more extensive territories must be considered, led to the formulation by our cost finding section of Rail Form A, which has been widely used as an acceptable means of comparing relative transportation costs.

A large part of the record in the instant cases pertains to relative costs of service and raises a question as to the extent to which Rail Form A computations reliably indicate such costs without extensive modifications and substitutions. In general, the complainants and the midwestern lines rely on that form, seeing no need for substantial departures therefrom, while the defendants urge that, although Rail Form A is basically useful, there is an imperative need for complicated special supplemental studies and substitutions to adopt it to the distinctive characteristics of transcontinental traffic.

Each of the groups presented cost studies based in varying degrees on Rail Form A and used these in formulating scales of costs considered useful to some extent for determining divisions. For purposes of comparison representative distances for the traffic to and from official territory are 600 miles by carriers in that territory, 700 miles by midwestern lines, and 1,600 miles by transcontinental lines. There are shown below the percentages for those distances which would result from the above-mentioned scales:

	Eastern	Western
	Percent	*Percent*
Complainants' study ----------	26.7	73.3

	Eastern	Midwestern	Mountain Pacific
	Percent	*Percent*	*Percent*
Midwestern lines' study	25.5	23	51.5
Defendants' study	22.9	17.2	59.9

A similar comparison relating to midwest-transcontinental divisions shows representative distances of 700 miles for midwestern lines and 1,600 miles for those in mountain-Pacific territory. The percentages for such distances under the scales of those carriers are as follows:

	Midwestern	Mountain Pacific
	Percent	*Percent*
Midwestern lines' study	32.4	67.6
Defendants' study	27.8	72.2

The complainants applied Rail Form A to the accounts of the railroads in the eastern and western districts, and used those applications to devise cost scales for the two districts in 50-mile blocks for different types of equipment with various loads shown in their traffic study for October 1953. Later, they submitted another scale based on defendants' revised traffic sample. The factors shown for the eastern lines in this scale for distances up to 1,000 miles are on the average approximately 25 percent higher than those for the western carriers. The underlying costs are on the fully distributed basis, including a 6-percent return on the Commission's elements of value, less depreciation, and excluding passenger and less-than-carload deficits. If divisions were based on this scale, the complainants on an average would receive 29.5 percent of total revenue instead of 24 percent as settled. It is this showing upon which the complainants urge that divisions should be prescribed so as to afford them 32 percent of the total official-mountain-Pacific revenue taking into account the rise in their costs since 1957.

In our opinion the complainants' study, based as it is on the single-test period for October 1953, obscures seasonal characteristics inherent in such a study, particularly in the movement of perishable commodities among others. Some recognition of this deficiency is to be found in their own evidence. The use of

costs of the eastern district only, i.e., excluding those of the Pocahontas region, is also open to serious question. Although it would be difficult to determine the definite impact of this exclusion, it seems likely that the costs shown for the complainants were thereby increased at least slightly. We agree that there was inconsistency in including costs of the railroads in the New England region, whose interest in this traffic was approximately 2 percent, and excluding the Pocahontas lines with a share of 5 percent.

The midwestern lines applied Rail Form A to the operating expenses and statistics of each group of railroads separately for 1953, 1954, and 1955 to develop group fully distributed costs, including less-than-carload and passenger deficits, and return at 4 percent on the Commission's elements of value after Federal income taxes. The groups were as follows: eastern district, Pocahontas region, the principal midwestern complainants (then 12 in number but reduced to 10 by subsequent mergers), and the principal transcontinental defendants. These unit costs, by years, were applied to traffic units for the same years taken from our waybill statistics. The traffic included was to and from transcontinental territory only, and no cognizance was taken of statistics of carriers in midwestern territory other than the 12 above referred to. This study shows cost percentages for participants in official-transcontinental traffic as follows: Eastern, 24.87; midwestern, 22.51; transcontinental, 52.62. The respective as-settled revenue percentages shown in the study were 21.63, 19.78, and 58.59. For midwestern-transcontinental traffic this study shows the following cost percentages: midwest, 32.58; transcontinental, 67.42. The respective as-settled revenue percentages were 26.77 and 73.23. The midwestern lines also devised two divisional scales, based on their cost computations, one for official-transcontinental traffic and the other for midwestern-transcontinental traffic. The first of these is a 3-way scale, in which for distances up to 1,000 miles the eastern factors average approximately 18 percent higher than the western factors. In their 2-way scale for midwestern-transcontinental traffic the two sets of factors are substantially equal. The limitation of the studies to the 10 principal complainants in Sub-No. 1 results in an incomplete showing of comparative transportation costs as between all the major railroads in midwestern territory and the other contending groups.

We turn now to the defendants' cost studies. In their suggested 3-way scale for official-mountain-Pacific traffic the factors in

the first 10 hundred-mile blocks for the mountain-Pacific carriers on the average are 18 percent higher than those for the eastern lines. In the 2-way scale the mountain-Pacific factors are 31 percent higher than those for the midwestern railroads.

The defendants' studies indicate that the revenue now received by carriers in the three territories from the divisions under consideration amounts to 47 percent of the total carload freight revenue of the defendants, 15 percent of that of the midwestern lines, and 6 percent of that of the complainants. The percentage relations to total ton-miles are approximately the same, except that in midwestern territory the ton-mile percentage is 19. The defendants emphasize these figures for several reasons. They find support therein for their assertion that any changes in the present divisions will have much more important consequences for them than for their opponents. They urge also that, since Rail Form A reflects conditions affecting average movements, it is essential to make allowance for the fact that transcontinental traffic accounts for a much larger proportion of defendants' total freight business than it does for the corresponding totals of the midwestern lines and the complainants.

The defendants concede upon the showing in their cost studies that the application of Rail Form A without adjustments produces costs for mountain-Pacific railroads which are substantially accurate, but argue from their studies that the actual costs in official territory are 19 percent below the Rail Form A unadjusted costs and that those in midwestern territory are 20 percent below.

For a proper application of the principles of Rail Form A, defendants undertook "the assembly in full detail of the operating service units which measure the amount and kind of service rendered on a representative sample of transcontinental movements, and the application to these service units of unit costs developed through Rail Form A, with substitution of direct costs wherever proper and feasible."

To assemble the operating service units the defendants used a subsample of the sample of individual carload movements in their 1953 traffic study. The selection was by a scientific process and resulted in the designation of 7,380 carloads as representative, 3,226 carloads between official and mountain-Pacific territories and 4,154 between midwestern and mountain-Pacific territories. Some of defendants' officials then endeavored to ascertain, as best they could, the probable routes traversed in detail by the sample cars in each of the territories in order to

estimate the extent of branch-line movement, the comparative use of way and through trains, origin, destination, and interchange switching, as well as other services. Data for seven of the sample cars were presented in an exhibit to illustrate the methods followed in computing costs for the entire sample. In the defendants' initial study operating expenses for 1953 were the basis of the computation. Later in the hearings the defendants presented another study, which is similar in a general way to the first but is marked by some important differences.

The end product of the defendants' first study was a purported showing that on cost proportions the revenue from the 7,380 carloads would have been divided as follows: mountain-Pacific carriers, 63.25 percent; midwestern carriers, 22.67 percent; eastern carriers, 14.08 percent. The actual shares of the revenue as settled were 63.65 percent to the mountain-Pacific carriers, 22.99 percent to the midwestern carriers, and 13.36 percent to the eastern carriers. In the 1956 study, based on statistics for that year, the showing of revenue divided on cost proportions was as follows: mountain-Pacific, 63.82 percent; midwestern, 21.61 percent; eastern, 14.57 percent. The shares as actually settled were: mountain-Pacific, 63.76 percent; midwestern, 22.24 percent; eastern, 14.00 percent.

By way of rebuttal of the showing in the defendants' 1953 cost study, the midwestern lines made a study of line-haul services which could be measured from actual records, including wheel reports, dispatchers' train sheets, and time slips for trains in which the cars included in the defendants' sample were moved. They also made a study of the switching minutes in terminal service attributable to a random subsample of that sample. The items of line-haul cost embraced in the midwestern lines' special study represent about 25 percent of the total of such items, and the elements of terminal service studied are about 50 percent of the total for such service. The study purports to show that if the terminal expense of the midwestern lines is adjusted to reflect the distinctive conditions disclosed by the study, the corresponding unadjusted figure would be increased 20 percent, and the adjustment in the line-haul expense, a much larger figure, would produce a reduction of 4 percent. The net result of the adjustment for terminal and line-haul expense combined is an increase of 0.1 percent, which is negligible. The midwestern lines therefore argue that, insofar as it is possible to make a direct assignment of costs to individual shipments, the unadjusted figures arrived at

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by application of Rail Form A must be accepted as accurately measuring the proportionate expense to the midwestern lines in their handling of intraterritorial traffic between points on their lines and those of the defendants.

The evidence pertaining to the cost studies of the defendants and the midwestern lines was extensive. In addition to the detailed testimony of the cost analysts who planned the studies and supervised their compilation, evidence was presented by many other witnesses concerned with operating, statistical, engineering, and mathematical aspects of the projects. In criticism of the studies the complainants and the midwestern lines also introduced detailed evidence of the same general nature and considerable bulk.

The preparation of the studies entailed the accumulation of voluminous working papers containing underlying figures and other data. The parties made available to one another a considerable part of these working papers for inspection or copying; if that had not been done, the studies would have been largely unintelligible. In later stages of the hearings, copies of numerous working papers were reproduced as exhibits, but apparently the greater part of the working papers were not made a part of the record. Counsel were unwilling to agree to a stipulation that all such papers be considered as in evidence. The defendants' counsel thereupon sought to introduce numerous working papers not already in the record, but this evidence was excluded for reasons stated by the hearing examiners in their recommended report. We affirm that ruling.

As previously mentioned, defendants' cost study included a number of substitutions and adjustments to Rail Form A costs. Some of these are appropriate refinements of the Rail Form A procedure while others are acceptable alternative methods of computing costs. However, some we could not accept as being proper and others were not or could not be uniformly applied to each territory.

We now consider six departures from Rail Form A costs in the defendants' cost study which we believe to be important, having significant cost consequence, and present our restatement of that study.

(1) For use in applying Rail Form A, our cost finding section has published figures based on a 7-day study of empty-return ratios by territories. The defendants, however, substituted ratios developed from information available to them in their own operations for those resulting from the 7-day study. Their empty-return ratios were developed as follows: for general purpose

boxcars on studies in mountain Pacific and midwestern territories; for refrigerator cars on the loaded and empty car-miles for four transcontinental refrigerator car owners; for potash cars on the experience of the AT&SF; and operating opinion for automobile loader, auto parts, and private cars. The great bulk of the traffic at issue moves in boxcars and refrigerator cars and it is the adjustment in the empty ratios of these cars which has a material effect on relative costs.

The empty-return ratios used for refrigerator cars were based on a study of the movements of cars owned by PFE, WFE, SFRD, and NP. This study was attacked on the following bases: (*a*) the study included car movements not at issue in this case; (*b*)some refrigerator car movements at issue in this case were not included in the study, for instance, 32 percent of midwest-mountain-Pacific refrigerator traffic is handled in cars of other ownerships than the four studied, and (*c*) there is a duplication in the mountain-Pacific ratio because the car movements in gathering areas are counted twice.

The defendants made a study of the empty return ratios for general purpose boxcars in mountain-Pacific territory by tracing a one-tenth of 1 percent sample of loaded cars which crossed the mountain-Pacific border for the year ended August 31, 1955. They also made a study of empty-return ratios for the Midwest based on the midwestern portion of four transcontinental roads, and used the resultant ratio for the eastern district also. They were unable to make studies for the other territories comparable in scope to the one in mountain-Pacific territory because the data were not available to them.

A comparison of the ratios obtained by these special studies and the ratios from the 7-day study follows:

	Defendants' study	7-day study
	Percent	*Percent*
Mtn.-Pacific roads	36	32
Tcl. split roads in mtn.-Pac. territory	36	38
Tcl. split roads in Midwest	18 and 22	38
Midwestern roads	18 and 22	33
Eastern roads	18	36 to 44

In the mountain-Pacific territory where adequate data were available to the defendants their special study results are more comparable to the 7-day study results than in the other territories. The principle underlying defendants' studies was con-

tested by the midwestern cost witness who stated that boxcars and other general purpose cars are operated in a pool by the railroads and are available for loading all kinds of commodities throughout the railroads' systems and that there is no logical basis for associating any particular empty movement of general purpose cars to any specific traffic.

In this case where the relationship of one territory to another is of critical importance it is requisite that any special studies be made on a comparable basis in each territory. The defendants' empty-return study in the Midwest was inadequate and there was no study in the East; therefore, to obtain comparable data in each territory it is necessary to use in our restatement the empty-return ratios from our 7-day study.

(2) The defendants consider that Rail Form A is deficient in not producing an accurate separation of constant and variable costs of maintenance of way and structures operating expenses (running), and return on road-running facilities.

Defendants, in computing the costs of maintenance of way and structures operating expenses (running), and return on road-running facilities, assign to each mile of track a constant amount and assign to variable or out-of-pocket costs the remaining roadway expenses and return. The constant amount per mile of track for the track expense accounts (202-221) was $989 in all territories, then increased for the other maintenance of way expense in each territory to become for the year 1956 in mountain-Pacific, $1,955; in midwest, $1,811; and in official, $2,045. The constant part of 6 percent return on investment was computed at $1,373 in all territories and when expanded to provide for income taxes in each territory became: mountain-Pacific $2,500, midwest $2,445, and official $2,417.

The defendants' position is that--

the constant portion of the maintenance costs (i.e., the portion of the maintenance unaffected by traffic volume) is most closely approximated by the maintenance expenditures on lines of very low traffic volume. Such minimum expenses (per mile of track) were ascertained from correlation studies relating the maintenance costs to the traffic. Further information was obtained from submissions to this Commission in abandonment proceedings and from the examination of the maintenance cost per mile for class II and class III roads.

Further confirmation was obtained in studies of 60 AT&SF branch lines. The level of constant or minimum return per mile of track was developed by dividing 50 percent of the United States return on road property (before Federal income taxes) by the corresponding miles of track. The reasonableness of the resulting level of constant return per mile of track was checked by independent tests, including analysis of investment accounts of light density class II roads and light density AT&SF lines in mountain-Pacific and midwestern territories.

Defendants state that Rail Form A assigns to branch-line traffic in the Midwest only the equivalent of $39 for the constant expense of maintenance (accounts 202 to 221) per mile of branch-line track as compared with $936 actually expended. They do this for the purpose of proving that the Rail Form A procedure does not properly allocate costs between branch-line and through-line traffic and overstates the costs of the traffic here at issue which moves principally over through lines in the Midwest. The $39 is computed in the following manner:

1. Total of accounts 202 to 221, midwestern roads, year 1956	$125,475,940
2. Constant portion—20 percent	$25,095,188
3. System trailing gross ton-miles, excluding cabooses (000)	273,891,337
4. Constant cost per MGTM (line 2 ÷ line 3)	$0.09162
5. Trailing gross ton-miles on branch lines (000) (calculated)	8,465,558
6. Constant cost assigned to branch lines (line 4 x line 5)	$775,614
7. Miles of branch-line tracks	19,667
8. Constant per mile of branch-line tracks (line 6 ÷ line 7)	$39

Constant costs are incurred on behalf of the operation as a whole, cannot be associated on any rational basis with any kind of service units, and therefore are unrelated to gross ton-miles. For this reason the amount of constant assigned to branch lines on line 6 and the constant cost of $39 per mile on line 8 are without real meaning and cannot be accepted. Rail Form A makes no separation between main line and branch line. These constant expenses produced by Rail Form A, if allocated equally over every mile of track in the Midwest, both main and branch, would amount to $359 per mile.

In lieu of the Rail Form A method of computing constant expense and return which vary among the railroad groups when reduced to a per-mile-of-track basis the defendants used a constant amount of dollar cost per mile for roadway constant expense, as well as return, which is the same for all miles of running track of all descriptions in all sections of the United States. The constant expense per track mile of $989 was determined from a multiple regression formula applied to the track accounts 202-221, track miles, and gross ton-miles of 28 class I freight railroads covering the period 1951 to 1957. The constant amount of return per track mile of $1,373 was computed by taking 50 percent of the return on roadway running facilities for all class I railroads in the United States and dividing by the number of miles of track owned.

The multiple regression formula has been tested by applying to it a variance analysis with the following results:

(1) When the variation explained by gross-ton-miles alone was subtracted from the variation explained by both gross-ton-miles and miles of track, the result showed that 84.4 percent of the variation was explained by gross-ton-miles, 7.1 percent by miles of track, and 8.5 percent (standard error) was unexplained; and (2) when the variation explained by miles of track alone was subtracted from the variation explained by both gross-ton-miles and miles of track, the result showed that 71.8 percent was explained by miles of track, 19.7 percent by gross-ton-miles, and 8.5 percent was unexplained.

These results are unsatisfactory. They are due to the fact that the influence of the two variables is not mutually exclusive, and demonstrate that the multiple regression formula proves little in the absence of corroborating evidence. The other evidence consists of an analysis of the returns to abandonment questionnaires in 88 cases filed between 1954 and 1957, a study of maintenance expenses of 143 class II roads, and a study of light density branch lines on the AT&SF.

The defendants found that the annual average cost for track maintenance (Accounts 202-221) in the 88 abandonment cases was $948 per mile. They point out that this understates the cost of continued maintenance of low density lines because normal business considerations result in the deferral of maintenance on lines that have become candidates for abandonment. This evidence supports the conclusion reached by their correlation analysis of the constant maintenance cost per mile on 28 class I freight railroads. This data was arrayed by midwestern complainants

in order of density, with the omission of one line which was considered to be unrepresentative because it had 48 bridges in 34 miles, as follows:

Defendants' study of abandonment dockets separated by density groups

Gross-ton-miles per mile	Number of abandonments	Expense per track-mile
Under 25,000	21	$391
25,000 to 49 999	14	725
50,000 to 99,999	23	898
100 000 to 199,999	15	1,032
200,000 to 3,123 487	14	1 257
	87	

The above array indicates that constant maintenance expense tends to increase with density.

The defendants made an analysis of the total maintenance costs per track mile shown in the 1956 annual reports for 143 class II railroads in the lowest density group and found a cost per mile of track of $2,164, which they compare to their constant maintenance cost per track mile of: mountain-Pacific, $1,955; midwest, $1,811; and official, $2,045. They state that the figure of $2,164 contains a small proportion of variable cost and that it confirms the constant cost per mile.

The midwestern lines rearranged this data for these 143 class II railroads by density groups and by territories as follows:

The 143 light density class II roads

Group (1)	No. of roads (2)	Rev. ton-miles per mile of road (3)	M of W.&S expense per mile of road (4)	Percent of average (5)
0 to 24,999	27	18,107	$1,366	51
25,000 to 49,999	25	42,057	2,174	81
50,000 to 99,999	32	73,927	2,160	81
100,000 to 199,999	35	141,170	2,690	101
200,000 to 399,999	24	272,019	3,992	149
Average		123,833	2,674	100
Official	59	109,290	2,396	90
Midwest	43	135,568	2,355	88
Mountain Pacific	41	125,285	3,480	130
Average		123,833	2,674	100

[fol. 1133]

These data indicate that expense per mile increases as density increases and that the expense per mile is substantially more in the mountain-Pacific than in the other two territories. It is significant that the Midwest has at the same time both the highest density and the lowest cost per mile, and that although the 41 roads in mountain-Pacific territory are of average density their cost per mile is 48 percent greater than the roads in the Midwest.

The systemwide density of traffic of the three groups of roads in thousands of gross ton-miles per mile of track in 1956 is:

		Percent
Official	7,095	120.6
Midwest	4,087	69.5
Mountain Pacific	7,388	125.6
Average	5,881	100.0

The information available from both the abandonment dockets and the light density class II roads shows a definite relationship between density and constant cost per mile of track; i.e., the higher the density the greater the constant cost. The use of a United States average constant expense per track mile tends to overstate the constant cost in the midwestern territory because of its lower than average density and to understate the constant cost of the other two territories because of their higher than average density.

The United States average constant return per track mile before income taxes of $1,373 was used in all territories. The corresponding amount by territories (computed from data of record) was $1,840 for official, $1,788 for mountain-Pacific, and $1,009 for the Midwest. The use of the United States average overstates the amount of constant return in the Midwest and understates it in the other two territories.

The underlying principle used by the defendants of relating constant costs to track miles is not condemned as such, however, the manner in which it was computed and applied is questioned. The use of a United States average for the constant portion of maintenance of way and structures (running) expense and return

on investment has the result of ignoring or even giving a reverse effect to differences in cost among the various territories. For this reason these costs are computed by the Rail Form A method in our restatement of defendants' cost study.

(3) In the defendants' first cost study the expense of locomotive repairs, supplies, depreciation, and return on investment associated with such expense was allocated on the basis of fuel consumption, with adjustment of return and depreciation to reflect the number of locomotive-unit miles. In their later study the expense for locomotive repairs and supplies was computed on the basis of diesel-unit miles. The locomotive cost per diesel-unit mile applied in all territories was the average of all three. There is some reason to believe that the underlying number of locomotive-unit miles was not accurately assigned to the sample traffic, and we are not persuaded that the use of uniform average expense here is sound in connection with an effort to discover territorial cost differences. The testimony of a witness for complainants indicates that locomotive-unit mile costs are substantially higher in eastern territory than in western territory due, in part at least, to the larger engine districts in the West, which have the effect of increasing locomotive-miles per day.

The evidence shows three bases of computing locomotive costs: (*a*) fuel consumed, (*b*) diesel-unit miles, and (*c*) gross ton-miles. For the reasons above stated our restatement of defendants' cost study computes locomotive costs based on the gross ton-mile method as applied in Rail Form A separately for each territory. This method, we believe, produces proper and more equitable results among the territories.

(4) The defendants' cost study includes an equal amount per service unit in all three territories for group I costs, which include car repairs, depreciation, and return, on general purpose or per diem cars for the stated reason that the differences among territories in the cost per car-mile are due to conditions which are unrelated to the handling of interterritorial traffic. The other two parties state that the group I car-mile costs for each territory as computed in Rail Form A reflect actual differences in costs in each territory which the roads in those territories must recover to come out whole.

The defendants assign as a principal cause of higher car-mile costs in the East the high proportion of gondola and hopper cars in that district. The proportion of ownership of cars is:

	Box	Open top G. & H.	Other
	Percent	*Percent*	*Percent*
Eastern	48	47	5
Western	51	31	18

The defendants reason that because open-top cars make fewer car-miles per year than other type cars the repair costs per mile for open-top cars are greater. This does not quite prove their contention; in fact, the closeness of the percentages for boxcar ownership suggests that there are cars or car movements in the West other than open-top cars and boxcars which may offset the effect of open-top cars in the East.

The Rail Form A group I costs of a given road include principally car repairs, depreciation, and return on all cars owned. Per diem payments for foreign cars serving on this road are added, and per diem receipts from home cars serving on a foreign road are subtracted. The inclusion of per diem settlements adjusts the costs from the basis of cost of cars owned to the basis of cost of cars serving on the road. These latter costs are divided by the service car-miles to give a cost per car-mile. Thus, if per diem is more or less than car ownership costs, a substantial difference can result: a difference which represents actual dollars paid out or received.

In the defendants' sample of official-transcontinental traffic (not including the Pocahontas region) the relationship of the total car-miles run in each territory by cars of all ownerships was 21.4 percent in official territory and 78.6 percent in western district. The total car-miles run in all territories separated by ownership was eastern-owned cars 43 percent, western-owned cars 44 percent, and other 13 percent. Although these figures are not exactly comparable, they nevertheless support the conclusion that there is a greater use of eastern cars in the western district than there is of western cars in the eastern district.

The complainants state that one of the reasons for the higher car-mile cost in the East is the western lines' use of the eastern car fleet and to eastern lines having the repair expense incident

to that use. To this the defendants reply that the fault lies in the inadequacy of the car-hire rate and should be remedied in a car-hire proceeding, not this case.

The other major reason given for the higher car cost in the East is the greater utilization of cars in the West. Indications of this greater utilization are: (*a*) average miles per serviceable car-day in the West are 56.7 miles and in the East are 35.0 miles; and (*b*) average miles per engine district of 90.7 in the East and 109.0 in the West. It is also of interest that the average haul of transcontinental traffic is about 600 miles in the eastern district and 2,200 miles in the western district. The greater population density and congestion in the East, which is reflected in shorter engine districts, more grade crossings, and yards and metropolitan districts closer together make for lesser car utilization in terms of car-miles per day. This results in a higher cost per mile.

The evidence shows that the territorial difference in car-mile costs are the result of actual operations. They are caused mainly by geographical differences and the application of the same per diem rate to territorial groups of carriers having different degrees of car utilization and costs. These differences are related to and partially caused by the traffic at issue.

The differences in car-mile costs among the three territories should not be concealed by using the same cost for all. Therefore, in our restatement the defendants' cost study is adjusted by using the Rail Form A car-mile cost applicable to each territory.

(5) In the defendants' 1953 study, branch-line costs were computed on a solely related basis; that is, at the level of 100 percent of operating expenses, rents, and taxes, plus 100 percent of a 6-percent return on net book investment after income tax. In their 1956 study, however, this basis was limited to traffic originating on their branch line "on which 50 percent or more of the cars originated and terminated are related to transcontinental traffic." The nature of this relationship was not disclosed in the defendants' study, but it later appeared that the cars counted included, not only those actually used for transcontinental traffic, but certain others containing "raw materials one step back from the manufacturing process" — logs, pulpwood, grain, sugar beets, and even coal, sand, fluxing stone, and fuel, as deemed appropriate by the persons who were called on for this information.

We are unable to accept the theory that a proportion of 50 percent of such traffic on a branch indicates such a degree of

dependence thereon as to support the defendants' differentiation. Taking into account the broader category of commodities above mentioned in inconsistent with the concept of a branch line used exclusively for a given purpose.

The amount of this solely related cost included in the defendants' 1956 study which represents about 0.38 percent of their cost proportions on official-mountain-Pacific traffic and about 0.29 percent of their cost proportions on midwest-mountain-Pacific traffic, has been deleted in our restatement in order to place all three territories on a comparable out-of-pocket basis.

(6) In arriving at an allowance for return on investment in property devoted to transportation service, consideration must be given to the amount of the proper investment base, the rate of return, and the treatment of Federal income taxes. The parties are in disagreement on each of these points. Of these the first is the most important and will be discussed infra in connection with revenue needs.

The defendants computed return on investment at 6 percent after Federal income taxes which represents approximately 10 to 11 percent before Federal income taxes, depending on territory, the complainants at 6 percent before income taxes, and the midwestern carriers at 4 percent after income taxes. Our cost finding section, for purposes of its studies, has computed return at 4 percent after income taxes. This rate for many years has represented the historical average for class I line-haul railroads as a whole. Although there is evidence tending to show that the long-term cost of capital is not less than 6 percent, this fact is principally relevant to total revenue needs. For the present purpose of cost ascertainment we regard 4 percent as proper.

Concerning the treatment of income taxes, on a similar point in *Increased Freight Rates, 1951*, 284 I.C.C. 589, 617, this Commission said:

> While fully cognizant of the magnitude of petitioners' estimates of increased Federal income taxes otherwise, we see no alternative to following the decisions of the Supreme Court, and considering in a rate proceeding that such taxes are a proper charge to operations and deductible as such in arriving at a fair return.

The same principle, we believe, must be applied to divisions. Accordingly, for purposes of comparison among territories Rail Form A out-of-pocket costs reflecting a 4-percent return on

elements of value, after Federal income taxes, is used in our restatement of defendants' cost study.

We are convinced that the defendants' cost studies understate the costs in eastern and midwestern territories. Furthermore the cost studies of both the defendants and the midwestern lines indicate that the complainants are entitled to higher divisions. That of the defendants points to an increase of at least 4 percent in eastern revenue, but according to the midwestern study an increase of nearly 15 percent therein would be justified.

Giving effect to out criticisms of six of the defendants' departures from Rail Form A costs above stated the following table shows our restatement. Also shown are the results of defendants' cost study and Rail Form A costs; and for comparative purposes the revenue as settled based on defendants' study. The Rail Form A costs, (column 4) are at the out-of-pocket level for the year 1956, including a 4-percent return after Federal income taxes on elements of value and freight-train car empty-return ratios from the 7-day study. Also, they are based on the defendants' railroad groupings except that the unit costs of the so-called split roads, which operate both in mountain-Pacific and midwestern territories, were applied on a system average basis. All costs are on the so-called revenue territory basis and the percentages reflect aggregate out-of-pocket costs in each territory.

	Out-of-pocket costs			
	Revenue as settled (1)	Defendants' cost study (2)	Restatement (3)	Rail Form A (4)
Official-mountain-Pacific traffic:				
Mountain-Pacific territory	$12,525,265	$8,916,391	$7,961,945	$8,052,875
Midwestern terr.	4,166,823	2,646,074	2,915,018	3,100,293
Official terr.	4,665,244	3,619,872	3,833,762	4,065,965
Total	$21,357,332	$15,182,337	$14,710,725	$15,219,133
Midwest-mountain-Pacific traffic:				
Mountain-Pacific territory	$11,633,046	$7,576,989	$6,787,337	$6,897,880
Midwestern terr.	4,327,628	2,929,720	3,121,143	3,208,419
Total	$15,960,674	$10,506,709	$9,908,480	$10,106,299
Official-mountain-Pacific traffic:				
Mountain-Pacific	58.7 percent	58.7 percent	54.1 percent	52.9 percent
Midwest	19.5	17.4	19.8	20.4
Official	21.8	23.9	26.1	26.7
Total	100.0 percent	100.0 percent	100.0 percent	100.0 percent
Midwest-mountain-Pacific traffic:				
Mountain-Pacific	72.9 percent	72.1 percent	68.5 percent	68.3 percent
Midwest	27.1	27.9	31.5	31.7
Total	100.0 percent	100.0 percent	100.0 percent	100.0 percent

The difference between defendants' cost study (column 2) and our restatement (column 3) consists solely of the six adjustments previously discussed. All of the other refinements to and departures from Rail Form A costs, as computed by defendants, remain in our restatement. Their aggregate cost effect is measured by the difference between our restatement (column 3) and Rail Form A costs (column 4). These other refinements in defendants' cost study include gathering area studies, interchange and intertrain and intratrain switching, train crew wages, miscellaneous train expenses, train fuel, other running (group III) costs, terminal adjustment, short-line railroad costs, special service, and other lesser items. The special services include eastern produce terminals, transloading, reconsignments and diversions, floating, et cetera. Some of these items are discussed below:

(a) *Gathering studies.*—A total of 30 special gathering studies were made by the defendants, and apparently these were started in an early stage of their preparation before the parties had become impressed with the desirability of employing sampling procedures in such studies. Defendants say that they were satisfied that the studies "covered major gathering areas." Later it turned out that a considerable number of representative shipments embraced in their cost studies had not originated in the previously selected gathering areas, but the defendants point out that, "cars from non-study areas were applied costs based on study areas with like operating conditions *** on the basis of operating judgment." As usual in such situations, there was much argument on this point which involves the process technically called imputation.

The evidence indicates that study cars originated in the gathering areas incur a greater than average amount of service and handling. The gathering studies are a measurement of the specific services rendered these cars and despite certain weaknesses we believe they more closely approach the actual cost incurred by these cars than the system average costs produced by unadjusted Rail Form A. As previously set forth, the solely related costs were deleted.

(b) *Train crew wages.*—Train crew wages were assigned to through trains, engine district by engine district, on the basis of wage rates applicable over each road participating in the haul. They are not the actual wages paid on a specific train but are an estimate of the wages paid on a typical through train on each engine district. The midwestern lines state that crew wages are overstated in mountain-Pacific territory because the traffic moves in trains of greater weight than the average train weight used as a divisor of train crew wages.

(c) *Interchange switching.*—The defendants assigned interchange switching cost on the basis of a count of the actual number of interchange handlings. This is a more accurate method than their assignment on an average basis according to distance.

(d) *Special services.*—These include instances in which certain shipments incur handling and expense not usually given to most traffic. The defendants followed the principle, which is correct, of applying appropriate unit costs for the particular service as such services were performed in the movement of the study traffic. These services include the produce terminals in the

East, floating in San Francisco, New York, and across Lake Michigan, clerical costs of reconsignments and diversions, weighing, switching for feeding, watering, and resting livestock, platform and switching costs for transloaded cars, switching and terminal costs for cars stopped in transit, and others. Many of these items are relatively not large but they generated a great deal of testimony both pro and con. Their net effect was a small increase in the costs of the East and mountain-Pacific territories relative to the Midwest.

Concerning defendants' refinements to and departures from Rail Form A costs discussed in items (*a*) through (*d*) above, and others listed in the paragraph immediately preceding item (*a*), some are relatively insignificant while others are wholly or partially offsetting. It is our opinion that the adjustment of each and every one of these refinements and departures would, in the final analysis, produce net results of negligible effect. It should be noted, however, that while we considered these items in our analysis but did not adjust them in our restatement, this should not be construed as meaning either an acceptance or rejection thereof. Rather, based on the cost data of record, it is our opinion that in this proceeding, which involves a large and varied body of traffic, adjustment of every one of defendants' many refinements and departures is neither warranted nor justified. This is substantiated by the following table which shows the percentage point differences between our restated costs and Rail Form A costs; and between revenue as settled and each of the cost showings:

	Revenue as settled	Restated defendants' cost study	Rail Form A costs	Differences in percentage points		
				Revenue over cost		Cost vs. Cost
				Restated costs	Rail Form A	
	(1)	(2)	(3)	Cols. 1-2 (4)	Cols. 1-3 (5)	Cols. 2-3 (6)
	Percent	*Percent*	*Percent*			
Official-mountain-Pacific traffic:						
Mtn.-Pac.	58.7	54.1	52.9	+4.6	+5.8	+1.2
Midwest	19.5	19.8	20.4	-0.3	-0.9	-0.6
Official	21.8	26.1	26.7	-4.3	-4.9	-0.6
Midwest-mountain-Pacific traffic:						
Mtn.-Pac.	72.9	68.5	68.3	+4.4	+4.6	+0.2
Midwest	27.1	31.5	31.7	-4.4	-4.6	-0.2

The significance of column (6) is the smallness of the difference between the two cost showings; one, based on a study made in great detail of the particular services rendered this traffic, and the other, a straight Rail Form A application. One substantiates the other, and supports the view that, for a large and varied body of traffic as here at issue, territorial average costs will be the substantial equivalent of specific costs.

The above cost evidence shows that for the official-mountain-Pacific traffic the defendant lines received a share of revenue which was between 4.6 and 5.8 percentage points more than their share of the cost of furnishing the service, the midwestern lines received from 0.3 to 0.9 percentage points less, and the official lines received from 4.3 to 4.9 percentage points less than their proportion of the cost of furnishing the service. The defendant lines received a division of revenue on the Midwest-mountain-Pacific traffic which was from 4.4 to 4.6 percentage points more than their share of the cost of furnishing the service and the midwestern lines correspondingly less.

Based on the next-preceding table, our restated costs show that the settled revenue of defendants from the traffic to and from official territory was 157 percent of their out-of-pocket costs. The settled revenue of the midwestern lines exceeded their out-of-pocket costs by 43 percent, and the corresponding excess of the complainants was 22 percent. In the case of traffic to and from midwestern territory defendants' revenue was 171 percent of their out-of-pocket costs while midwestern lines revenue was 139 percent of their out-of-pocket costs.

The parties are in disagreement as to the treatment of fully distributed costs as distinguished from out-of-pocket costs in computing relative costs in cases of this character. The complainants and the midwestern roads contend that fully distributed costs, including an apportionment of the constant costs on a ton and ton-mile basis provide a proper measure of relative cost of service. On the other hand, the defendants rely exclusively on out-of-pocket costs for this purpose, contending that constant costs have a bearing on revenue needs and not relative costs. Each group excepted to the recommended report because it did not undertake to settle this controversy.

In *Class Rate Investigation, 1939*, 262 I.C.C. 447, 571, the Commission said:

[fol. 1143]

Rail costs are fundamentally divisible into two components. First, those expenses which vary directly with the traffic handled, and hence are directly assignable to particular kinds of traffic, i.e., the out-of-pocket or variable expenses, and secondly, those expenses of a constant or fixed character, which are not capable of assignment to particular kinds of traffic, and which must be borne by the various kinds of traffic in proportion to the ability of each to pay. The sum of the out-of-pocket costs plus a pro rata distribution of the constant cost is referred to as fully distributed cost.

Necessarily, constant costs are incurred as a result of transportation as a whole without regard to the amount of service performed. Being unrelated to separate units of service, any assignment of them to such units by an averaging process is necessarily arbitrary, and this fact must be kept in mind in considering the weight to be accorded cost studies constructed in this manner. This is not to say that constant costs are to be disregarded or that out-of-pocket costs should be used as the sole basis for judging divisions, but it seems desirable that there should be separate showings of the two classes of costs. For example, out-of-pocket costs may be useful in determining the amount of revenues for each contending group required to avoid confiscation. We agree with the defendants that constant costs are significant in the consideration of revenue need, but we do not agree that section 15(6) of the act, providing that we "shall give due consideration, among other things *** to the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation" requires any particular treatment of constant costs.

None of the contending groups is urging that divisions to be prescribed should rest solely on ascertained costs of service. Notably the defendants contend that their suggested divisional scale for mountain-Pacific territory before referred to should be increased 35 percent in recognition of their claimed revenue need. This percentage is said to have been determined by experimentation to provide a basis which would produce an overall increase of 10 percent in their revenue from the divisions in issue, but no details of the process were stated. Their principal cost witness analyzed the problem involved as follows:

There is necessarily more to divisions than a showing of the comparative costs of the service performed, no matter how effectively this latter task may be performed. Section 15(6) of the Interstate Commerce Act refers to

the amount of revenues required to pay respective operating expenses, taxes, and fair return, including total carrier financial needs, carrier credit, and the burden of meeting the necessary constant costs, the passenger deficits and return on investment. The composition of each carrier's traffic, the distribution of the burden among all traffic carried, and the financial dependence of the respective carriers upon the traffic in question are vital factors to be weighed. It is plain that no single formula can be used to fix fair divisions under all circumstances.

If on traffic to and from official territory the divisions of the defendants were to be increased 10 percent, as they urge, their percent of revenue over their out-of-pocket costs as shown in our restatement would become 73 percent instead of 75 percent. The midwestern lines' percent of revenues over their out-of-pocket costs would shrink from 43 percent to 23 percent, and that of the complainants from 22 percent to 4 percent. Similarly with respect to traffic to and from the Midwest the defendants' percent of revenue over their out-of-pocket costs would become 89 percent instead of 71 percent, and that of the midwestern lines would be reduced from 39 percent to 1 percent.

It is worthy of note that the defendant's suggested divisional scales said by them to reflect actual costs without consideration of revenue needs applied in the manner which they outline would increase many of the most important present divisions. The eastern division between Pittsburgh and the Pacific ports via St. Louis, for example, would be increased from 20 to 25 percent. The eastern division between Detroit and the Pacific ports via Chicago would be raised from 13 to 15 percent. Between Chicago and San Francisco via Council Bluffs the midwestern division would be increased from 16.5 to 22 percent. Between St. Louis and Spokane via Council Bluffs the midwestern division, now 12.1 percent, would become 21 percent. Between New Orleans and Los Angeles via El Paso the present midwestern division, 47.4 percent, would be increased to 50 percent. Between Memphis and Phoenix via El Paso the present midwestern division, 51 percent, would be increased to 62 percent.

Even under the proposal of the defendants designed to increase their revenue by 10 percent some of their present divisions would be reduced. On this point they say:

The increase which we proposed in the divisions of the mountain-Pacific lines was specifically reflected in scales that would produce the proposed result. Application of those scales to the Chicago-Council Bluffs haul having

a present division of 16.5 percent would produce divisions of 18.6 percent on traffic receiving terminal service in Chicago and 13.6 percent on traffic bridged through Chicago * * *.

REVENUE NEEDS

The report in *Class Rates, Mountain-Pacific Territory*, 296, I.C.C. 555, contains a detailed discussion of the growth and economic development of that territory and its relation in these respects to other territories. To a considerable extent that discussion was based on evidence presented by the Mountain-Pacific State commissions, which there supported a reduction in the class rates but are here alined with the defendants in urging an increase in their divisions. Some of that evidence was also incorporated in the present record.

On page 583 of that report is a table showing the increases in population of the Mountain-Pacific States from 1920 to 1952. During that period the total increase for those States was 134.7 percent, compared with 47.4 percent for the United States. The 1960 census figures, which we officially notice, show that from 1920 to 1960 the population of the Mountain-Pacific States increased 205 percent, and that of California more than doubled between 1940 and 1960. In the report last cited the Commission said (Page 583):

> The phenomenal growth of the 11 western States since 1940 is largely due to activities in connection with World War II. The expected postwar decline in population did not materialize for manufacturing, and the demand for consumer goods which expanded under the war economy has continued in an upward trend rather than a downward trend to meet the needs of the postwar economy.

In 1890, when the divisions here under consideration had begun to conform to their present pattern, the population of the Mountain-Pacific States was 3.102 million, 5 percent of the total of the entire country. The present population of the same States, 26.9 million, is 15 percent of the total. The shifts in population and consequent economic changes have also had marked effects on the fortunes of the railroads.

After the end of World War I temporary unsettling influences affected the railroads in 1919-22. Accordingly, the relatively prosperous period from 1923 to 1930, inclusive, before they began to suffer acutely from the depression of the "thirties," affords a fair basis of comparison with the post-World War II period

since 1945. The average annual freight traffic of the American railroads, measured by revenue ton-miles, was about 44 percent greater in 1946-58 than it was in 1923-30, but the increase was by no means uniform, as shown in the following statement (based upon data of record):

	Revenue ton-miles			
	1923-30		1946-58	
	Annual average (millions)	Percent of total	Annual average (millions)	Percent of total
Eastern district	176,591	42.1	197,024	32.6
Pocahontas region	40,807	9.8	57,142	9.5
Western district	144,215	34.4	263,674	43.6
Southern region	57,377	13.7	86,520	14.3
	418,990	100.0	604,360	100.0
Transcontinental group	58,553	14.0	130,889	21.7

Some features of the foregoing figures should be emphasized, notably the increase of nearly 124 percent for the transcontinental group. The increase for the western district other than that group was 55 percent, somewhat more than the southern increase of 51 percent. The increase for the eastern and Pocahontas lines was only 12 percent and was responsible for the striking decline of their share of the total from 51.9 percent in 1923-30 to 42.1 percent in 1946-58, putting them below the western district.

The following statement is a similar comparison of freight revenue:

	Freight revenue			
	1923-30		1946-58	
	Annual average (thousands)	Percent of total	Annual average (thousands)	Percent of total
Eastern district	$1,949,672	42.6	$2,587,164	36.0
Pocahontas region	281,911	6.2	545,222	6.8
Western district	1,719,330	37.6	3,447,226	43.0
Southern region	621,816	13.6	1,143,313	14.2
	4,571,729	100.0	8,025,925	100.0
Transcontinental group	712,596	15.6	1,730,525	21.6

The increase in the figure for the transcontinental group was 142 percent, compared with the overall average increase of 76 percent. For the western district other than the transcontinental group, the average increase was 70 percent.

Net railway operating income is compared in the following statement:

[fol. 1147]

	Net railway operating income			
	1923-30		1946-58	
	Annual average (thousands)	Percent of total	Annual average (thousands)	Percent of total
Eastern district	$446,080	41.3	$268,618	29.1
Pocahontas region	86,999	8.1	99,780	10.7
Western district	405,513	37.6	403,406	43.7
Southern region	140,332	13.0	152,354	16.5
	1,078,924	100.0	924,158	100.0
Transcontinental group	198,966	18.4	203,160	21.9

The most significant feature of the latter statement is the reduction of 31 percent for the carriers in official territory, contrasted with the overall reduction of 14 percent.

The three comparative statements last above shown indicate clearly the inferior position of the railroads in official territory as freight carriers, compared with the western district since World War II. In 1923-30, the annual average ton-miles of the official territory lines exceeded those of the western district by 51 percent; in 1946-58 the official average was 4 percent lower than the western. The official lines in 1923-30 had 30 percent more freight revenue than the western district; they had 0.3 percent less in 1946-58. The net railway operating income of the official lines in 1923-30 was 31 percent greater than that of the western district; in 1946-58 it was 9 percent less.

The three statements also show the growing importance of the transcontinental lines. In 1923-30 they accounted for 40.6 percent of the ton-miles of the western district; their percentage in 1946-58 was 49.6. Their freight revenue in 1923-30 was 41.5 percent of the total for the western district; this percentage increased to 50.2 in 1946-58. The transcontinental lines' percentage of the total net railway operating income of the western district, however, increased only from 49 percent in 1923-30 to 50 percent in 1946-58, for reasons discussed infra.

Comparative rates of return on investment represented by the earnings above shown will now be considered. The defendants say that such comparisons should be centered on "1955 and 1956, the most recent years of normal business activity and also for 1957, a year influenced by the recent recession." These years were 3 of the only 4 years between 1946 and 1958 in which the net railway operating income of the eastern roads exceeded that of the roads in the western district, 1953 being the other. Con-

sequently, in these 3 years the eastern figure exceeded the western by about 7 percent. The average rate of return for the eastern district and the Pocahontas region in this period was 3.82 percent and for the western district 3.50 percent. In the 13 years, 1946-58, as a whole, eastern net railway operating income was 9 percent lower than the western. (The effect of differing passenger deficits on this comparison will be pointed out later.)

Whether 1955, 1956, and 1957 may be considered "normal" years of business activity is a matter of opinion as to which economists might well differ. They were not representative for comparing earnings of the eastern and western railroads, however, for the reason that the aggregate freight revenue of the railroads in the eastern district and Pocahontas region in those 3 years slightly exceeded that in the western district contrary to the marked trend since 1951.

Until about 16 years ago the usual method of computing rates of return was to divide net railway operating income by investment in railway property as recorded in the carriers' accounts. To compare current rates of return with those for years before 1945 it is still necessary to use this method. In the following statement average rates of return for the principal railroad groups in the period 1946-58 are compared with those in 1923-30, the investment bases being recorded investment in road and equipment, materials and supplies, and cash, less accrued depreciation and amortization:

	Rates of return on book investment	
	1923-30	1946-58
	Percent	*Percent*
Eastern district	4.97	2.81
Pocahontas region	7.27	6.35
Eastern district and Pocahontas region	5.26	3.30
Southern region	4.63	4.47
Western district	4.23	3.68
Transcontinental group	4.58	3.86
Western district, except transcontinental group	3.94	3.50
Midwestern lines (complainants in Sub-No. 1)	----	3.49

In recent years comparisons of this kind have also been based on the elements of value determined by use of the Commission's

valuation data. For example, at pages 612-3 of the report in *Class Rates, Mountain-Pacific Territory, supra,* both methods were used in showing the following average rates of return for 1946-54:

Rates of return

	Net investment	ICC valuation—Ex Parte No. 175
	Percent	*Percent*
Eastern district (including Pocahontas region)	3.31	3.46
Western district	3.83	4.38

The difference is due principally to the discrepancy between recorded investment and valuation data for the transcontinental lines. The latter, therefore, urge that in comparing rates of return their book figures only should be used, while the complainants and the midwestern lines favor the use of the elements of value. The different results are shown in the following statement:

	Average rates of return, 1947-58	
	Book investment	Elements of value
	Percent	*Percent*
Eastern district	2.90	2.98
Eastern district and Pocahontas region	3.41	3.56
Midwestern lines	3.54	3.69
Transcontinental group	3.92	4.65
Western district	3.69	4.19

The disagreement on this point reflects a controversy which has existed for more than 15 years and hinges on the question whether the elements of value or the railroads' book investment figures more nearly show present values of their property for the purpose of administering the Interstate Commerce Act. The matter is considered to be of particular importance by the transcontinental railroads, whose book-investment figures are farthest out of line with the elements of value. As of 1957, the excess in the recorded investment of the defendants was about 10.4 percent, on the average. For the Southern Pacific, Northern Pacific, and Union Pacific, however, the differences were greater.

On behalf of these defendants it is asserted that they were "pioneer railroads," and that their cost of reproduction as found by the Commission's Bureau of Valuation assumed the use of facilities which did not exist at the time of original construction. The evidence offered in support of this view, we believe, is insufficient to disclose infirmities in the valuation process and certainly insufficient to show that the book figures of the defendants are unimpeachable.

The same question was considered in the Commission's report in *New Automobiles in Interstate Commerce*, 259 I.C.C. 475, which the defendants to a considerable extent rely on here. There, our Section of Cost Finding used the elements of value. On page 524 of the report, it was stated that "all railroads declined to accept the rate-making values furnished by the Bureau of Valuation," but the Commission pointed out that "all of the elements of value which the act requires shall be considered were taken into account by the Bureau of Valuation."

In our judgment, controlling weight should be given the showing based on elements of value consistently with the views expressed by the Commission in other divisions cases.[7]

Another contention of the defendants is that "the data of record overstate the true costs and understate the real earnings of the New York Central and the Chicago & North Western because they reflect acknowledged inefficiencies of their prior managements." In 1954 there was a change in the management of the New York Central after a heated and widely publicized proxy fight. About 2 years later, under somewhat different circumstances, the executive control of the North Western also changed hands.

The defendants presented a considerable number of statements in speeches, reports to stockholders, talks to security analysts, press releases, and testimony in administrative proceedings, in which the new executives criticized previously existing conditions on these railroads and commented unfavorably on the managerial capabilities of their predecessors. They therefore urge that "financial comparisons should exclude the temporarily depressed earnings of those two roads." The omission of the New York Central would raise the average rate of return of the eastern railroads in 1946-58, based on book values previously shown in this report as 3.30 percent, to 3.57 percent, and the omission of the North Western similarly would increase the rate of return for the western district from 3.68 percent to 3.80 percent.

[7] See Appendix A

The Commission is required to give "due consideration, among other things, to the efficiency with which the carriers concerned are operated," but in the nature of things such consideration presents a great difficulty in assigning a definite weight to this element in appraising either cost or revenue need. We discount the importance of the criticism of past managements of the New York Central and the North Western in the evidence before us as proof of past inefficiency.

For a proper comparison of rates of return the defendants would have us find that "consideration of the acquisition adjustment account is necessary to reflect the investment in road and equipment property of the carriers party to this proceeding." They contend that "the disregard of the acquisition account, sought by the midwestern lines, is an effort unlawfully to increase the investment of the reorganized carriers."

Acquisition adjustment is principally the amount of difference between (1) the recorded value of assets acquired, and (2) the par or stated value of capital stock and the face value of securities issued or assumed upon reorganization or merger. Detailed explanation of the nature of adjustment upon reorganization appears in *Chicago G.W.R.Co. Reorganization*, 247 I.C.C. 193 (1941). The reasons for the use of the account are fully stated in that report, and need not be repeated here.

The practical significance of the point raised by the defendants is indicated in the following excerpt from their brief:

> Failure to consider acquisition adjustment reduces the rate of return of the Midwestern roads by about 3/10ths of a percentage point, as compared to about 1/10th of a percentage point for the Mountain-Pacific roads, thereby changing rate of return comparisons by some 2/10ths of a percentage point in the interest of the Midwestern lines in this divisions proceeding. The Midwestern lines' disregard of the acquisition adjustment account is an effort to reverse the Commission and judicial action determining the investment of the reorganized roads and, specifically, to reverse the Commission's 1941 decision [above cited] establishing the investment accounts for reorganized roads.

By section 15(6) of the act, the Commission in prescribing divisions is required to give due consideration, among other things, to the amount of revenue required to pay a "fair return on their railway property held for and used in the service of transportation." The defendants' contention is in substance that the value of such property is net investment therein as shown in the carriers'

accounts determined by deduction of the acquisition adjustment in case of reorganized railroads.

There is no support for this contention in the report above cited. At page 196 thereof the Commission said:

> In the accounting classifications which we have prescribed for the carriers subject to our jurisdiction, investment in physical property is not stated on the basis of value but on the basis of cost. The amount shown as such investment in the balance sheet does not purport to reflect the value of the property in either sense above indicated [referring to "value in the strict economic meaning of the word" and "value for rate-making purposes" discussed in the next-preceding paragraph], but only its cost to the accounting carrier.

In our opinion controlling consideration need not be given to the acquisition adjustment in connection with evidence pertaining to the "fair return" mentioned in section 15(6).

It is generally agreed that comparisons of net railway operating income alone are not entirely reliable in judging the significance of rates of return on investment because of certain distortions in the incidence of the Federal income tax. Of principal importance is the fact that that tax applies to nonoperating income, known as "other income," as well as revenue from railway operations. The defendants have larger proportions of other income than the other contending groups. Another complication is due to the availability of income-tax savings from accelerated amortization of cost of defense projects completed before 1956. Federal income taxes were temporarily deferred for 5 years after completion of such projects through higher-than-normal tax credits, and in all probability the tax burden will be increased correspondingly for the remaining life of the property. The western roads principally received defense-project certifications, which thus indirectly tended to overstate their net income. Adjustments in reported net railway operating income to allow for these distortions can readily be made and are shown in the record. In the following statement average rates of return for 1951-68 based on adjusted and unadjusted net railway operating income applied to book investment bases are shown:

[fol. 1153]

	Average rates of return on book investment	
	1951-58 Unadjusted n.r.o.i.[1]	Adjusted n.r.o.i.
	Percent	*Percent*
Eastern district and Pocahontas region	3.47	3.26
Midwestern lines	3.54	3.11
Transcontinental lines	3.83	3.70

[1]Net railway operating income.

In comparing net railway operating income and rates of return based thereon, differences with respect to the passenger deficit, which have an important bearing on such comparisons should also be considered.

The record contains statistics for the years 1950-58 showing annual passenger deficits and freight net railway operating income for the larger railroads in all territories. A comparison of the figures for 1950 with those of later years is shown below:

Passenger deficits (thousands)

Year	Principal eastern district and Pocahontas lines	Principal western district lines	Transcontinental lines (AT&SF, D&RGW, GN, NP, SP, UP)
1950	$174,708	$202,881	$110,977
1951	250,873	265,745	151,621
1952	230,710	257,245	146,894
Average, 1950-52	218,763	241,957	136,497
1953	233,129	306,205	181,202
1954	195,919	315,972	193,202
1955	202,234	292,607	172,546
1956	226,233	321,461	189,944
1957	240,024	326,392	193,310
1958	179,112	290,444	170,400
Average, 1950-58	214,771	286,550	167,788

Several aspects of this showing should be noted. The principal eastern roads' average for 1950-58 was 1.8 percent below the 1950-52 average deficit, and in 1958 it was 18.1 percent lower than the 1950-52 average. The 9-year average for the principal western district roads was more than 18 percent higher than the 1950-52 average. The unfavorable western showing is accentuated by the inclusion of the transcontinental lines. Their average

annual deficit for 1950-58 was 22.9 percent higher than their 1950-52 average, and even after a slight reduction in 1958 it remained 24.8 percent higher. The passenger deficit for the principal western lines in 1958, excluding the transcontinental lines, was only 13.8 percent higher than the 1950-52 average.

The complementary comparison of freight net railway operating income in the next statement is pertinent:

Net railway operating income—freight service (thousands)

Year	Principal eastern district and Pocahontas lines	Principal western district lines	Transcontinental lines
1950	$482,565	$615,329	$344,495
1951	564,052	613,813	356,206
1952	592,714	650,211	360,612
Average, 1950-52	546,544	626,451	353,771
1953	608,648	681,766	388,312
1954	467,133	636,178	383,044
1955	583,559	671,946	404,292
1956	601,151	685,165	402,826
1957	541,608	656,575	392,175
1958	364,951	632,574	378,417
Average, 1950-58	534,076	649,284	378,931

The foregoing statement shows that the average for the principal eastern roads in 1950-58 was 2.3 percent less than the 1950-52 average, and their 1958 income was 33.2 percent lower than that for 1950-52. On the other hand, the average for the principal western roads for 1950-58 was 3.6 percent higher than the 1950-52 figure, and 1958 was 1.0 percent higher. In 1950-58 the transcontinental lines had an average annual gain of 7.1 percent over 1950-52, and their percentage gain in 1958 was 7 percent also. Without the transcontinental lines, the principal western district roads in 1958 would have had a 6.8 percent reduction below the 1950-52 average.

In the 9 years from 1950 to 1958 the principal western district railroads had average freight net railway operating income of $649.284 million, which was 21.6 percent greater than the eastern average of $534.076 million. This was a considerably greater spread than that between the average annual net railway operating income of the two groups from all services in the same period, $319.305 million for the principal eastern lines and $362.734

[fol. 1155]

million for the principal western lines, amounting to $43.429 million or 13.6 percent.

The defendants say in their brief:

> The traffic available to support the mountain-Pacific roads is very different from the traffic upon which the midwestern and eastern lines depend for their revenues. The severely depressed rates and unusual character of that traffic pose the greatest threat to the ability of the mountain-Pacific lines to maintain even their present low level of earnings and return to their owners.

Because of "hold downs" affecting their rates which have resulted from the general rate increases since World War II, one of the defendants' witnesses, a Union Pacific executive, testifying in 1956, stated that "rate action which has been designed broadly, and generally on the national basis, to offset increases in costs, has fallen far short of doing so in respect to the principal transcontinental traffic because of its highly competitive character." In the same vein he went on to say:

> just in the degree that the mountain-Pacific roads' reliance on traffic subject to this inherent disability is greater than that of other groups of roads, the persistent decline in our rate of return is more serious than that of other lines * * *. The competitive factors inherent in the traffic we handle operate to impose holddowns in the rate advances required by each round of wage increases. As this pattern is projected into the future * * * the position of the Union Pacific and other mountain-Pacific roads dependent on the long haul holddown traffic will continue to deteriorate relative to the roads relying on other traffic for the greater part of their revenue * * * the public has not been adequately aware of the Union Pacific's extremely unfavorable position as a railroad. Our eastern and midwestern friends have perhaps been more energetic in advertising their difficulties.

The statistics of record fail to show deterioration of the kind referred to by this witness. It has already been pointed out that the financial position of the mountain-Pacific lines as freight carriers in the postwar period as a whole has been better than that of either the eastern or the other western lines. The trend continued after 1956 when the testimony above quoted was given. The average freight net railway operating income of the transcontinental lines in 1957 and 1958, the latest years covered by the record, was only 4.4 percent less than it was in 1956, and there was substantially no change in the figure for the Union Pacific. On the other hand, the other principal western lines had a reduction of 8 percent, and the average annual freight net railway operating

income of the eastern lines in 1957 and 1958 was 25 percent lower than it was in 1956.

The comparisons of freight net railway operating income and passenger deficits also have a bearing on the assertion of the defendants that "the increased investment required in serving the growing mountain-Pacific territory has produced no return for the owners of the mountain-Pacific roads." This alleged deprivation results from passenger deficits of those roads, as will now be explained.

For example, in 1955 the Union Pacific had net railway operating income of $43.7 million and $44.1 million in 1950, a reduction of 1 percent, although its net investment in the same period had increased 21 percent. Its freight net railway operating income, however, increased from $74.8 million in 1950 to $90.3 million in 1955, an increase of 21 percent. For the 8 years 1951-58 its average annual increase in such income was 11 percent over 1950. This increase has not been reflected in net railway operating income from all services, however, for the reason that in 1951-58 the Union Pacific had an average passenger deficit of $45.7 million per year, 51 percent greater than its deficit in 1950.

Similarly, the defendants say that "in the 5-year period 1951-1955 the mountain-Pacific roads found it necessary to increase their net investment in transportation property by $800 million * * * but this increase in investment produced not one penny of earnings." Defendants say further by way of explanation:

> The net railway operating income of the mountain-Pacific rail group since 1950 has never equalled the 1950 figure. In effect, this group of carriers has yet to receive any return on the added $801 million investment in rail plant which it has made since the beginning of 1951.

Between 1951 and 1955, inclusive, the major mountain-Pacific railroads (AT&SF, GN, NP, SP, and UP) increased their net investment by $731 million, and the improved facilities were undoubtedly helpful to them in handling a steadily growing volume of traffic, which measured by revenue ton-miles showed an average annual increase in 1951-58 of 10 percent above 1950 and produced freight net railway operating income on the average 11 percent higher each year in 1951-58 than in 1950. Their decline in net railway operating income from all services after that year reflects the fact that their average annual passenger deficit in 1951-58, $174.9 million, was 58 percent greater than that of 1950.

The defendants lay stress on the fact that in 1956 the eastern lines' net railway operating income from all services was 22 percent higher than it was in 1951, while the increase for the mountain-Pacific railroads in the same period was only 4 percent. Here again the differing passenger deficits must be kept in mind. A comparison of freight net railway operating income of the two groups in 1956 and 1951 shows an increase of 6 percent for the eastern lines and 13 percent for the transcontinental lines.

Upon the facts relating to revenue need discussed on preceding pages, it is our conclusion that the eastern railroads are in a less advantageous situation as freight carriers than those in the western district. The most favorable comparison from the standpoint of the western lines, we believe, is the showing that the average return of the eastern district and Pocahontas region in 1946-58, based on net railway operating income from all services adjusted for income tax differences as before explained, related to book investment, was 3.26 percent, compared with 3.34 percent for the midwestern group and 3.89 percent for the transcontinental defendants. If the elements of value are used as the investment base, the percentages become 3.40 for the eastern lines, 3.49 for the midwestern group, and 4.64 for the defendants.

Of greater significance than this comparison of rates of return is the postwar trend of declining freight traffic of the eastern railroads shown on this record. Their average annual ton-miles for the period 1947-58, 253.4 million, were 4 percent lower than the number, 263.6 million in 1946. In only 4 of those years, 1947, 1948, 1951, and 1956, did their traffic measured by revenue ton-miles exceed that of 1946. The railroads in the western district, on the other hand, had an average of 265.3 million ton-miles per year in the same period, compared with 244.2 million in 1946, an increase of 9 percent. In only one year, 1949, did the western district fail to show an increase over 1946. For many years prior to 1949 the western district was below the eastern district and Pocahontas region with respect to total revenue ton-miles, but that year marked a turning point. In the decade 1949-58 the western district has led the East by an average difference of 7 percent. No developments are in sight which point to a reversal of this trend.

We turn now to the assertion of the midwestern lines that their revenue needs "are greater than those of the opposing eastern and transcontinental roads." They principally rely on statistics for

1957, which they consider "the most accurately representative recent year." In 1957 their net railway operating income, $108.85 million, was the lowest of any year since 1946, and was 17 percent lower than the average of $130.6 million for 1946-58. This 1957 figure was lower by $101 million than the net railway operating income of transcontinental roads and lower by $276 million than that of the official lines. The respective average differences in the 13-year period were $78.7 million and $230 million. With adjustment for differences in income tax before described, the midwestern lines show that their rate of return on elements of value in 1957 was 2.56 percent, compared with 3.17 percent for the official lines and 3.53 percent for the transcontinental group. The average rate of return for the midwestern lines in 1946-58 was 3.49 percent.

The following statement shows net railway operating income from freight service and passenger deficits of the principal midwestern lines (IC, GM&O, C&NW, CRI&P, MKT, MoPac, StL-SF, CB&Q, and CMStP&P) for the years indicated:

Year	Freight net railway operating income (000)	Passenger deficit (000)
1950	$289,037	$ 96,926
1951	274,964	121,047
1952	297,479	116,126
Average, 1950-52	287,160	111,366
1953	304,298	130,797
1954	275,569	130,938
1955	286,316	125,264
1956	302,428	143,851
1957	280,223	147,797
1958	276,789	134,823
Average, 1950-58	287,456	127,507

The comparatively stable freight income of the midwestern lines indicated in this table reflects the fact that they were not affected by the adverse influences which reduced the income of the eastern lines after 1952, nor by the conditions which increased the freight earnings of the transcontinental carriers in the same period. The increase in their passenger deficit, which was less than that of the transcontinental lines, also has a bearing on comparisons of net railway operating income from all services. The midwestern lines shared in the postwar expansion of railroad freight traffic in the western district before pointed out. In only 3 years of the 1946-58 period, namely, 1949, 1954, and 1958, did

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their ton-miles fall short of the number in 1946. Their overall average increase has been about 3 percent, compared with 13 percent for the transcontinental lines, 5 percent for the western district other than the latter lines, and a decline of 4 percent for the eastern district and Pocahontas region.

Upon all the evidence relating to revenue need, it is our view that the midwestern lines rank below the transcontinental roads in earning power as judged by statistics for the postwar period and that their prospects for sustained or increased freight income are less promising than those of the defendant transcontinental railroads. At the same time, as a group, they are shown to be in a considerably more favorable condition than the eastern railroads. That view is counter to the objective of the midwestern lines stated in their brief, as follows:

> The revenue effect of the proposal of the midwestern complainants, based on their one percent traffic study for 1953-1955, would be increases in revenue of 23.62 percent for the Midwestern lines and 4.78 percent for the Eastern lines, and reduction in revenue of 9.19 percent for the Transcontinental lines and 1.67 percent for the Southern lines. * * * the revenue results would be increases of approximately $38 million per year for the Midwestern lines and $4 million per year for the Eastern lines, and reductions of approximately $42 million per year for the Transcontinental lines and $3,300 for the Southern lines.

CONCLUSIONS

The last sentence of section 15(6), which has been quoted in part supra, is as follows:

> In so prescribing and determining the divisions of joint rates, fares, and charges, the Commission shall give due consideration, among other things to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

Commenting on this provision in its recent decision in *Boston & Maine R. v. United States*, 208 F. Supp. 661, affirmed 371 U. S. 26, the district court (Massachusetts) said:

"Due consideration" is not the equivalent of "primary consideration." The importance to be given any of the factors enumerated in the statute must necessarily depend upon the case under consideration. The evaluation of the importance of the various factors in any given case is peculiarily the function of the Commission.

Efficiency.—The complainants in their requests for findings say that "the record indicates that the contending groups of carriers are efficiently operated, and that eastern lines are second to none in this respect." The claim of the midwestern lines is that they "are as efficiently operated as the other carriers involved, and there are no significant differences in efficiency of operations among the actively contending groups." The defendants do not charge that either of the other two groups is inefficient, but, as stated earlier in this report, they criticize operating practices and facilities of the New York Central and the Chicago & North Western in past years, particularly in 1956, as wasteful and inefficient, and request the following finding:

Cost comparisons between railroad groups based on the data of record should take account of the overstatement of costs of the [New York] Central and the Chicago & North Western now in the process of correction, and financial comparisons should exclude the temporarily depressed earnings of those two roads.

The effect of excluding these two carriers from comparisons of rates of return, which we do not regard as vitally important, was pointed out earlier in this report. Data of record fail to show how cost comparisons would be affected by such exclusion.

In our opinion the record shows that none of the contending groups is more or less efficiently operated than another.

Public importance.—On this point the complainants request the following finding:

The transportation services of the contending groups of carriers are important to the public. The services of eastern lines in reaching and serving the populous market areas consuming transcontinental products and in originating the more compensatory westbound traffic provide an indispensable link in the chain of service essential to eastern and western shippers and receivers alike.

Similarly, the midwestern lines assert that they "are an important part of the national transportation system" and that "there is no real issue in these proceedings with respect to the relative importance to the public of the transportation services of any of the contending carriers."

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The following requested finding of the defendants is pertinent here:

In view of the public interest in maintaining and developing railroad transportation in the rapidly growing mountain-Pacific territory and the primary dependence of the roads serving that territory upon the transcontinental divisions for their revenues, the transcontinental divisions of the mountain-Pacific roads should be increased.

The defendants say further that "a way must be found to increase the earnings of the mountain-Pacific roads in order that their ability to meet the investment demands of the territory served not be impaired," that "railroads in all territories rely on railroad earnings as a primary source of funds for investment in railroad plants," and that it would be "an unwise reversal of regulatory policy to base any decision on the premise that the mountain-Pacific lines should not rely upon retained earnings for investment needs but should further add to their debt."

The intervening State commissions emphasize the importance of railroad transportation to the economy of mountain-Pacific territory in supporting the defendants' contention that their divisions should be increased. Evidence was presented by the interveners (other than the California Public Utilities Commission) relating principally to agricultural and industrial production in Washington, Oregon, and other northwestern States, from which there is an important eastward rail movement of forest products, deciduous fruits, canned and frozen fruits and vegetables, and mineral products. These commodities have been accorded competitive rates reflecting holddowns, and the interveners predict that further reductions in such rates will be necessary. In order to permit the mountain-Pacific railroads to increase their capital expenditures for the purpose of providing adequate transportation of the commodities before referred to, these interveners join in urging that the present transcontinental divisions of the mountain-Pacific lines should be increased.

Similarly, the California commission calls attention to—

the continuing rapid growth of California and the ever-increasing importance of rail transportation to the State, distant as it is from eastern markets; the needs of this State to be served by railroads having adequate earnings and sufficient financial strength to make investment in improvements, including purchase of cars, locomotives and other equipment, of sufficient magnitude to serve the transportation needs of California; the adverse consequences to the people and the economy of this State if the railroads terminating in California should be deprived of current earnings which are the means of meeting

such transportation needs; the importance to the California public and, especially to its lumber shippers and farmers of having products to compete in such markets, having been accomplished in the past by the application of so-called holddowns in general rate increase cases.

As estimated by the defendants, "the average hauls on transcontinental traffic are over 1,200 miles in mountain-Pacific territory, approximately 1,000 miles in the midwest, and 630 miles in official territory." Since about 58 percent of the total service measured by miles is rendered in the two territories last named, the railroads performing that service also have an important part in transcontinental transportation. In our opinion there are no differences in the importance to the public attributable to the three contending groups of carriers.

Required revenue.—Since the greater part of the record consists of evidence offered for the purpose of supporting the conflicting contentions that each of the three principal groups requires far more revenue from the traffic involved than it now receives, their numerous requests for findings necessarily reflected those contentions, and the same is true of their exceptions to the recommended report, the conclusions in which fell short of complete acceptance of the views urged by any one of the contending groups.

From our consideration of the cost evidence previously discussed in this report we are convinced that the present divisions are favorable to the defendants to an extent not justified by ascertainable cost differences. The evidence, however, does not provide an acceptable pattern for readjusting the existing divisions, which must reflect certain broader aspects of revenue need. This was recognized in the recent decision in *Boston & Maine R. v. United States, supra,* at page 675, where the court said:

> The question of divisions involves the making of practical judgements and cannot be solved "as though it were a mathematical problem to which there could only be one correct answer." *Interstate Commerce Commission* v. *Union Pacific R. R.*, (1912), 222 U. S. 541, 550.

The positions taken by the contending parties here afford support for the foregoing observation, for as before stated, their proposals reflect their views on revenue need to an equal if not a greater extent than on strict cost. Nothing in the nature of a mathematical formula to measure such need exists.

To increase the defendants' divisions by an average of 10 percent in recognition of claimed revenue need would have the effect

of requiring the eastern and the midwestern railroads to absorb the greater part of the reductions in the interterritorial class rates to and from mountain-Pacific territory approved by the Commission in 1955, based principally on improved economic and transportation conditions in that territory.

We are unable to agree with the defendants and the interveners that the public interest warrants increased in the divisions of the mountain-Pacific railroads in order to provide a source of investment funds required for enlarged facilities commensurate with industrial development in that region. The railroads in all sections of the country are faced with the continuing necessity of raising funds for additions and betterments and new equipment, and we cannot recognize any difference in the degree of this urgency among the territorial groups.

Admittedly, for geographical reasons the defendants must look to the transcontinental traffic for a larger proportion of their total freight revenues than the other two groups, but the large volume which has been handled under substantially improved transportation and operating conditions, as noted in *Class Rates. Mountain-Pacific Territory, supra* (page 655), "within the last 20 years," has been responsible for their growing freight earnings mentioned earlier in this report. It is apparent that all railroads are now and in the future will be dependent on long-haul freight traffic to a greater extent than they have been in the past. This is particularly true of the eastern lines.

From 1947 to 1958 the intraterritorial carload traffic of the railroads in official territory declined 36 percent, and the reduction in their interterritorial traffic in the same period was only 18 percent. In 1958 the latter traffic was 23 percent of the total, compared with 19 percent in 1947. It thus appears that the eastern roads no longer have available to them the profitable volume of freight originating within their own territorial borders which in past years caused them to be generally regarded as the strongest group of all American railroads. For this reason and others the transportation and economic conditions affecting the eastern and western railroads are far different from those which prevailed 75 years ago when this divisional structure was taking shape. Under the requirement of the public interest that all essential parts of the transportation system be maintained, so far as possible, in effective working condition *(New England Divisions, supra)*, we believe that there should be increases in the complainants' divisions reflecting revenue need as well as cost.

As between the defendants and the other western railroads the differences in earning power are less marked, but our consideration of the evidence bearing on cost of service previously discussed convinces us that the primary midwestern divisions as a whole are too low. This is particularly true of the divisions of rates to and from Chicago, St. Louis, Memphis, and New Orleans before referred to. In Sub-No. 1 principal but not exclusive attention was centered on the divisions of rates to and from midwest-east territory. These were the subject of the Commission's decision in 1934, which the defendants interpret as an affirmative approval of the then-existing divisions and consider to be of controlling importance here. The question of interpretation is of little moment, however, in view of changes which have occurred in the intervening years.

In the 1934 report the Commission emphasized the fact that "the transcontinental traffic is unevenly balanced as to direction," pointing out that "eastbound it is in general more than 3.5 times as heavy as westbound." (page 320) The 1953 traffic tests of the defendants show a movement of 993,141 cars eastbound and 664,035 cars westbound, the former figure being less than 1.5 times the latter. In the 1934 report the Commission stated that about 60 percent of all transcontinental traffic and about 70 percent of the eastbound perishable movement was overhead traffic to or from points east of Illinois. In 1953 the traffic between mountain-Pacific and official territory was 52 percent of the total and the perishable percentage was 66. The notable improvement in conditions affecting the transcontinental railroads previously described in this report has taken place since 1934. It is also a circumstance not without significance that never before in the litigation relating to the divisions east of the Missouri River gateways have the midwestern lines apparently felt free to join in a united effort to obtain higher divisions for their service in this territory.

Interterritorial divisions.—Throughout these proceedings the parties have considered it likely that any prescribed readjustments would be based on the use of divisional scales, popularly known as integer scales, which have been employed in some other decisions dealing with interterritorial divisions in the past 30 years. Although the complainants proposed no specific scheme of divisional factors, they express a preference for some form of scales on the ground that "this method permits definiteness of prescription and consequent earlier effectiveness of the Commission's requirements."

The midwestern lines presented a detailed plan for future divisions embodying scales based upon the so-called 28277 scale prescribed in *Official Western Trunk Line Divisions*, 269 I.C.C. 765. In addition to the fact previously mentioned that their plan would give them a share of revenue which we consider must too large in the light of the evidence relating to costs and revenue needs the plan is deemed technically unsound particularly as a basis for interterritorial divisions for reasons stated below.

The 28277 scale applies only to the territory east of the Rocky Mountains both under the decision last above cited and the later decision in *Akron, C. & Y. R. Co.* v. *Atchison, T. & S. F. Ry. Co.* 316 I.C.C. 351. In that territory the class rates are on the so-called 28300 basis. The transcontinental class and commodity rates, applying over maximum distances between the East and West, however, are broadly grouped in both territories. We therefore see no practical reason for divisions reflecting 50-mile blocks for interterritorial application, which might prove to be inconsistent with the rate grouping. Accordingly we agree on this point with the defendants, who are opposed to the use of divisional scales for a number of reasons, and say "that the present group basis of publishing transcontinental divisions is highly desirable in the light of competitive conditions affecting the routing of transcontinental traffic."

In appendix B, therefore, we have provided specific primary divisions for application east and west of the principal interchange points between defined groups in eastern and transcontinental territory. The eastern divisions there shown are higher than the present percentages in recognition of the evidence relating to cost and revenue need previously discussed herein.

In this regard, for example, the Seaboard-New England and the Pittsburgh groups and the Pacific coast and Spokane-Reno groups via Chicago are representative. The present division from the Seaboard-New England group to the Pacific coast group is 27.5 percent and the new division is 34 percent, which represents an increase of 24 percent; from the Pittsburgh group to the Pacific coast group the present division is 16.5 percent and the new division is 22 percent, representing an increase of 33 percent. From the Seaboard-New England to the Spokane-Reno group the present division is 27.5 percent and the new division is 38 percent, amounting to a 38-percent increase, whereas from Pittsburgh to the Spokane-Reno group the present division is 16.5 percent and the new division is 24 percent, which is approximately a 45-percent increase.

It is our best judgment that the eastern carriers' divisions between the above-named groups should be increased as shown, based on the evidence herein relating to cost and revenue need. The increases in the eastern divisions to and from the interior western groups are necessarily greater than those to and from the Pacific ports as our findings provide for three groups in transcontinental territory in substitution for the single group in effect today.

In *Class Rates, Mountain-Pacific Territory, supra*, the railroads proposed to establish a parity of rates between groups east of the Mississippi River and north and south Pacific coast terminals, and rates to and from the Spokane, Reno, Las Vegas group lower than those to the Pacific coast group. We approved both proposals. The grouping provided in appendix B follows the same general plan, which from the standpoint of cost of service, is preferable to the blanketing of transcontinental territory previously discussed in this report.

Our findings provide for general use of the existing eastern groups. The complainants propose and important departure; namely, the establishment of a new group embracing New England, separate from the present Seaboard-New England group. This action would be inconsistent with the grouping used for the transcontinental class rates, and upon the facts before us we would not be justified in requiring it. The complainants also propose the transfer of Richmond and Norfolk, Va., from the interior eastern to the seaboard group, as well as certain other changes of a minor nature. These changes appear to be desirable and should be capable of adjustment by voluntary negotiation. We agree with the complainants that there is no good reason for continuing the small Bessemer, Pa., group separately from Pittsburgh.

Our findings provide for a defined group of Illinois points principally served by eastern and southern railroads, as well as some western lines, and including also Evansville, Vincennes, and Terre Haute, Ind., which are on or near the Illinois-Indiana boundary. (The complainants would prefer the exclusion of the Indiana points.) The defendants strongly object to the proposal in the recommended report of a uniform minimum division of 15 percent for the terminal lines serving this proposed southeastern Illinois group in lieu of present divisions said to range from 6 to 12 percent. Both in many divisional bases voluntarily established in the past and as well in our decisions it has been common practice to accord minimum divisions for carriers having rela-

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tively short hauls, sometimes as high as 20 or 25 percent but more usually 15 percent. The increasingly burdensome terminal costs in recent years are persuasive that a 15-percent minimum is justified.

Interchange points.—Differences of opinion concerning interchange or dividing points are slight. Since the great majority of the traffic to and from the East moves through Chicago, Peoria, or St. Louis, it is generally agreed that those cities should be the principal dividing points. In addition, we have provided for the use of Mackinaw City, Mich., and for Kewaunee, Wis., the latter being representative for cross-lake routes.

There are a number of interchange points in Illinois which are now grouped with Chicago, Peoria, or East St. Louis, as the case may be. No dissatisfaction with that grouping has been expressed, and it may properly be observed in the application of divisions over the three major dividing points. Certain Mississippi River crossings north of St. Louis where no interchange takes place also serve as dividing points at present, notably East Louisiana and East Hannibal, Ill. At the hearings the complainants proposed that Kansas City or Omaha be primary interterritorial dividing points on traffic interchanged there between the Wabash and western lines. That proposal was disapproved in the recommended report and has been abandoned by the complainants, which now ask that East Hannibal continue to be used as a dividing point, and there is no objection to such use. Nor is there opposition to the further suggestion of the complainants that East Louisiana be eliminated. Cairo and Thebes, Ill., which are Mississippi River crossings south of East St. Louis, may properly be on the St. Louis basis of divisions.

A minor problem is presented by traffic which moves through two primary major dividing points. On shipments through both Chicago or Peoria and St. Louis it is agreed that the last-named point should be the primary dividing point. Where shipments move through both Chicago and Peoria, however, the midwestern lines and the complainants are in disagreement. We see no good reason for differentiating between Peoria and St. Louis in this respect.

Traffic which is interchanged between eastern and western railroads at St. Louis or East St. Louis generally requires the service of an intermediate terminal rail or motor carrier for the river crossing. At present the cost of that service on transcontinental traffic is borne by the western lines on both eastbound

and westbound shipments. The same arrangement formerly prevailed on all interterritorial traffic at St. Louis, but as result of the decisions of the Commission relating to divisions of rates between official territory, on the one hand, and southwestern and western trunkline territories, on the other hand, the eastern lines pay intermediate charges on westbound shipments to those territories and the western lines pay them on eastbound freight. It is generally agreed by the parties that this arrangement should be extended to transcontinental shipments.

Although the complaint in No. 31503 covered divisions of rates to and from intermountain territory, which includes the eastern portion of mountain-Pacific territory not embraced in transcontinental territory, there is no evidence relating specifically to the intermountain divisions other than those of rates to and from Montana, which are in issue in Sub-No. 1. Also there is no evidence bearing on the divisions between the East and the West over routes through southern territory. Accordingly we shall exclude from our findings the divisions of intermountain rates, except those to and from Montana, and those on traffic which moves through southern territory. It should be possible for the interested carriers to agree upon such modifications of these divisions as may seem necessary in the light of the findings herein.

Intraterritorial divisions.—Although broad groups are now employed in connection with the divisions of rates between midwestern and transcontinental territories, they are less well defined than those on which the interterritorial divisions are based, and in a number of instances they appear not to be properly related to distance. The midwestern lines urge that in lieu of prescribing new intraterritorial divisions on a group basis we should formulate scales of divisional factors and authorize the two groups of carriers to apply these to groups agreed upon by them. The defendants apparently are not opposed to that course. In our opinion divisional scales afford an appropriate means of readjusting the intraterritorial divisions, and the possibility of such use was discussed extensively in the record.

A witness for the defendants presented such a scheme, embracing scales said to reflect costs computed in their cost studies, the scale for the defendants being on the average 27 percent higher than that proposed for midwestern territory. The defendants say that these scales "provide a basis scale to which such adjustment can be made to produce the desired distribution of revenues."

(As before stated, the defendants propose such an adjustment devised to increase their revenue from intraterritorial divisions by about 5 percent.) Having found that the defendants' cost studies understate the costs of the midwestern lines for reasons before pointed out, we could not properly approve the use of these scales.

Another suggestion by the same witness, not advanced as a proposal, was based on use of the so-called 29886 scale of divisional factors prescribed in *Official-Southwestern Divisions*, 287 I.C.C 553, for movements in midwestern territory, and a scale similarly constructed from the intraterritorial class-rate scale prescribed in *Class Rates, Mountain-Pacific Territory, supra*, (appendix 3) commonly referred to as the 30416 scale, for application within that territory. The suggested scale for the latter territory on the average is 22 percent higher than the 29886 scale. These scales would afford the midwestern lines less revenue than they now receive according to the defendants' showing and less than they would receive by use of the cost scales discussed in the next-preceding paragraph.

Consistency with our action in prescribing intraterritorial class rates for mountain-Pacific territory higher than those in the rest of the country based on the so-called 28300 scale makes it logical to provide a higher scale of divisional factors for that territory here, but a difference of more than 10 percent would not be justified in our opinion. The scales shown in appendix C reflect that difference. They would produce moderate increases in some of the most important midwestern divisions.

Transit and reconsignment.—The midwestern lines ask that certain traffic subject to transit arrangements and reconsignment involving unusual out-of-line or backhaul service be excepted from application of the divisions prescribed in this report. There are now special divisions covering this traffic which have resulted from agreements between midwestern and transcontinental lines. Although some of the traffic moves to or from eastern territory, the proportions of the eastern railroads are not affected by these special divisions.

As an illustration of this traffic, the midwestern lines cite a transit movement of barley from the Twin Cities to Chicago and malt from that point through Council Bluffs to the Pacific coast. They assert that any general basis of divisions would be inappropriate for such traffic, and that any revision of the special divisions thereon "that might be called for in light of the divisions prescribed on the general body of traffic could probably be worked out by negotiations between the interested carriers."

The proposed exception is opposed by the defendants, which charge that these special divisions constitute "an unusually preferential divisions arrangement." There is no evidence to support this contention. In our judgment it is proper to except the special divisions from the general bases herein prescribed.

FINDINGS

1. We find that the present divisions of joint rates applicable to the transportation of property between points in eastern or official territory and points in transcontinental territory (including Montana) as between the complainants in No. 31503 (including the Missouri-Illinois Railroad Company) and in No. 31503 (Sub-Nos. 4 and 5), on the one hand, and the defendants in the said complaints, cross-complainants therein, and the complainants in No. 31503 (Sub-No. 1), on the other hand, are unjust, unreasonable, and inequitable.

2. We find that just, reasonable, and equitable divisions in lieu of those referred to in finding 1 would be those set forth in appendix B hereto.

3. We find that the present divisions of joint rates applicable to the transportation of property between points in midwestern territory, as herein defined, and points in transcontinental territory (including Montana), as herein defined, as between the complainants in No. 31503 (Sub-Nos. 1, 2, and 3) and the defendants and cross-complainants in the said complaints, are unjust, unreasonable, and inequitable.

4. We find that just, reasonable, and equitable divisions in lieu of those referred to in finding 3 would be those set forth in appendix C hereto.

The hearing examiners' rulings on evidence are affirmed, for reasons stated in the recommended report.

An appropriate order will be entered.

COMMISSIONER BUSH, CONCURRING IN PART:

I concur in the finding that the existing divisions assailed in these complaints are unjust, unreasonable, and inequitable, although the divisions prescribed for the future are more favorable to the complainants than I would be inclined to prescribe in the exercise of my own individual judgment.

The discussion of the cost evidence in the report, I believe, satisfies the requirement of section 15(6) that there be due consideration of "the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their

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railway property." In addition, consideration was given to relative financial needs, which, as the courts have consistently recognized, is a pertinent factor, *New England Divisions Case*, 261 U. S. 184, 191; *United States* v. *Abilene & S. Ry. Co.*, 265 U. S. 274, 284; *Baltimore & O. R. Co.* v. *United States*, 298 U. S. 349, 360. In the decision last cited it was expressly pointed out that we are not limited to consideration of the return to services covered by the divisions under consideration but may take into account returns from all service.

It is clear that there have been changes in conditions affecting transportation in mountain-Pacific territory which have been advantageous to the railroads in that territory. There were found to justify reductions in the class rates to, from, and within that territory, *Class Rates, Mountain-Pacific Territory*, 296 I.C.C. 555, 655. As recognized by the Supreme Court such changes may be considered in passing upon divisions as well as rates, *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U. S. 74, 88.

The objective in cases of this kind is not to equalize fortunes but to assure a national transportation system sound and healthy in all its parts. Herein, to my way of thinking, lies the public interest responsibility of the Commission in a difficult decision.

COMMISSIONER HUTCHINSON, DISSENTING IN PART:

While I agree with the majority that present divisions are unjust and unreasonable and that adjustment is warranted, I am not convinced the record justifies the prescription of divisions at the levels fixed by the report.

The majority seems to emphasize the revenue needs of the eastern roads without giving adequate consideration to the impact of the adjustment on the revenues of the transcontinental lines which originate the preponderance of the traffic and depend upon revenue from interterritorial traffic to a far greater extent than do eastern and midwestern carriers.

Although the report is silent as to the actual amount of revenue the prescribed divisions would shift from the transcontinental lines to eastern and midwestern carriers, estimates indicate the figure would exceed $50 million annually. The record does not warrant so substantial a shift of revenues between the contending carrier groups.

Accordingly, I do not believe the best interests of the public or the carriers, as a whole, will be served by the prescribed divisions.

COMMISSIONER FREAS, DISSENTING:

While it is true that the prescription of divisions involves the exercise of judgment, there must nevertheless be a clear enunciation of the reasons, with appropriate reference to the facts relied upon, for the conclusions reached. Section 8(b), Administrative Procedure Act. Here the gap between the evidence and the ultimate findings is not bridged. See *Stanislaus County* v. *United States*, 193 F. Supp. 145 (N. D. Calif. 1960). Although some adjustment may be warranted — certainly as to traffic to and from such points as Spokane, Reno, and Phoenix — the substantial changes prescribed by the majority are, in my opinion, not supportable.

The majority finds that none of the contending groups of carriers have been operated either more or less efficiently than another; yet the record contains substantial criticism of the past managements of two carriers which does not seem to have been given effect. It is also concluded that there are no differences in importance to the public of the services of the three groups of carriers. If, as it seems to me this report indicates, the controlling criterion is the revenue needs of the carriers based largely on costs, the record, in my opinion, is fatally defective.

The defendants submitted special studies concerning the handling of the particular traffic involved and have made various adjustments in their overall costs more precisely to reflect the aspects of the transportation, whereas the complainants have generally relied upon nothing more than overall territorial average costs. Considering especially the relationship of the total volume of traffic handled by the respective groups of carriers to the interterritorial traffic at issue, it was incumbent upon the complainants, who must sustain their burden of proof in order to get any relief, to present more meaningful and accurate data regarding the involved freight.

To the extent that costs are a consideration I deem it entirely proper to give effect to differences resulting from such basic factors as grades, curvatures, tunnels, and bridges. However, excepting possibly in situations not here present, I consider it improper to equalize the different fortunes of groups of carriers which are the result of economic conditions prevailing in the various localities. This is so whether done indirectly through the application of territorial average costs, or directly through a showing of density and flow of traffic or of net railway operating income produced from overall operations in a certain area. With

equalization as the objective there will be little point or incentive for either investor or management to seek out and invest money or expend effort in the more promising carriers.

COMMISSIONER GOFF, DISSENTING:

A glance at a relief map will disclose the series of mountain ranges, over and through which the mountain-Pacific lines must perform gathering or distribution service and line hauls. Insufficient consideration has been given to their relatively higher efficiency, to the importance to the public of their transportation services, and to the fact they are predominantly the originators of traffic. With all respect to my associates, primary consideration of revenue need seems here to have unduly swayed better judgment in arriving at the new scale of divisions.

I would retain the present basis as more equitable than the, to me, confiscatory extremes prescribed.

APPENDIX A

Notes

2. Individual carriers will sometimes be referred to by their initials or other abbreviations.

3. Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

4. The exceptions are as follows: Wyoming—stations on and east of the line of the UP, Laramie and east; Colorado—stations on and east of the line of the C&S between Cheyenne, Wyo., and Trinidad, Colo.; New Mexico—stations on the line of the Texas-New Mexico Railway Company.

5. The term "transcontinental territory" as used in this complaint embraces all of Arizona, California, Oregon, and Washington, substantially all of Nevada, and the western portions of Idaho, Utah, and New Mexico. "Midwestern territory" includes all of western territory east of the Rocky Mountains except Montana, Wyoming, North Dakota, and northern Minnesota. Sub-No. 1, however, covers divisions of interterritorial and intraterritorial joint rates to and from Montana points over routes via northern lines.

6. The oldest method of dividing joint rates disclosed by railroad history is the mileage prorate or some modification thereof. In 1893 a spokesman for the transcontinental lines in a controversy over divisions referred to the time-honored character of such a basis in the following words:

"The question which we are now called to consider has been brought up repeatedly within the last 20 years. It has been often discussed and as often settled on the present basis. * * * We contend that a basis of divisions which has stood the test of time since the first overland roads were completed—now nearly a quarter of a century—must have been founded on correct principles; principles which govern divisions of revenue on through traffic not only through-

out the United States, but the world over. I need not go outside this meeting to find ample proof of what I say, namely, that the principles which govern our present basis of divisions apply generally on through traffic."

7. *Southwestern-Official Divisions*, 234 I.C.C. 135, 147; *Official-Southwestern Divisions*, 287 I.C.C. 553, 564.

APPENDIX B

Primary divisions prescribed between complainants and defendants in No. 31503 and Sub-Nos. 4 and 5

Territorial groups in eastern territory hereinafter referred to are as follows: E-1, points heretofore embraced in the seaboard-New England group also known as groups A and B; E-2, points heretofore embraced in the interior trunkline or Syracuse group also known as group C; E-3, points heretofore embraced in the Buffalo-Pittsburgh-Bessemer groups also known as groups D and E; E-4, points heretofore embraced in the Detroit-Indianapolis-Cincinnati groups, also known as group F (except Evansville, Vincennes, and Terre Haute, Ind.); E-5, points on southern, western, or eastern railroads in Illinois south and east of the line of the Atchison, Topeka & Santa Fe between Chicago and Peoria and the line of the Gulf, Mobile & Ohio between Peoria and East St. Louis, and also Evansville, Vincennes, and Terre Haute, Ind.

Territorial groups in western territory hereinafter referred to are as follows: W-1, points in California, Oregon, and Washington (except Spokane); W-2, Spokane, points in Nevada, and points in Idaho embraced in transcontinental territory; W-3, points in Arizona and points in New Mexico embraced in transcontinental territory; W-4, points in Montana west of and including Havre, Great Falls, Helena, and Butte; W-5, points in Montana other than those in W-4.

SECTION I

Between—	Interchange points	Percentages	
		East	West
1. E-1 and W-1	Chicago	34	66
	Peoria	36	64
	St. Louis	37	63
2. E-1 and W-1 (except California)	Mackinaw City or Kewaunee	34	66
3. E-1 and W-2	Chicago	38	62
	Peoria	39	61
	St. Louis	40	60
4. E-1 and W-2 (Spokane only)	Mackinaw City or Kewaunee	38	62
5. E-1 and W-3	Chicago	37	63
	Peoria	41	59
	St. Louis	42	58
6. E-1 and W-4	Chicago, Mackinaw City, or Kewaunee	40	60
	Peoria	42	58
	St. Louis	41	59
7. E-1 and W-5	Chicago, Mackinaw City, or Kewaunee	44	56
	Peoria	46	54
	St. Louis	45	55

SECTION II

Between—	Interchange points	Percentages	
		East	West
1. E-2 and W-1	Chicago	28	72
	Peoria	30	70
	St. Louis	31	69
2. E-2 and W-1 (except California)	Mackinaw City or Kewaunee	28	72
3. E-2 and W-2	Chicago	31	69
	Peoria	33	67
	St. Louis	34	66
4. E-2 and W-2 (Spokane only)	Mackinaw City or Kewaunee	31	69
5. E-2 and W-3	Chicago	32	68
	Peoria	36	64
	St. Louis	37	63
6. E-2 and W-4	Chicago, Mackinaw City, or Kewaunee	34	66
	Peoria or St. Louis	37	63
7. E-2 and W-5	Chicago, Mackinaw City, or Kewaunee	39	61
	Peoria	42	58
	St. Louis	42	58

SECTION III

Between—	Interchange points	Percentages	
		East	West
1. E-3 and W-1	Chicago	22	78
	Peoria	24	76
	St. Louis	25	75
2. E-3 and W-1 (except California)	Mackinaw City or Kewaunee	22	78
3. E-3 and W-2	Chicago	24	76
	Peoria	26	74
	St. Louis	27	73
4. E-3 and W-2 (Spokane only)	Mackinaw City or Kewaunee	24	76
5. E-3 and W-3	Chicago	24	76
	Peoria	29	71
	St. Louis	32	68
6. E-3 and W-4	Chicago, Mackinaw City, or Kewaunee	28	72
	Peoria	31	69
	St. Louis	31	69
7. E-3 and W-5	Chicago, Mackinaw City, or Kewaunee	32	68
	Peoria	35	65
	St. Louis	35	65

SECTION IV

Between—	Interchange points	Percentages	
		East	West
1. E-4 and W-1	Chicago	17	83
	Peoria	18	82
	St. Louis	19	81
2. E-4 and W-1 (except California)	Mackinaw City or Kewaunee	17	83
3. E-4 and W-2	Chicago	19	81
	Peoria	20	80
	St. Louis	21	79
4. E-4 and W-2 (Spokane only)	Mackinaw City or Kewaunee	19	81
5. E-4 and W-3	Chicago	19	81
	Peoria	22	78
	St. Louis	25	75
6. E-4 and W-4	Chicago	23	77
	Peoria	24	76
	St. Louis	26	74
7. E-4 (Michigan only) and W-4	Mackinaw City or Kewaunee	23	77
8. E-4 and W-5	Chicago	25	75
	Peoria	26	74
	St. Louis	28	72
9. E-4 (Michigan only) and W-5	Mackinaw City or Kewaunee	25	75

SECTION V

Between—	Interchange points	Percentages	
		East	West
1. E-5 and W-1	Chicago, Peoria, or St. Louis	15	85
2. E-5 and W-2	do	15	85
3. E-5 and W-3	do	17	83
4. E-5 and W-4	do	19	81
5. E-5 and W-5	do	21	79

SECTION VI

Notes

The divisions prescribed in section V shall not apply on shipments to and from points on the line of the Wabash Railroad Company when it performs service both east and west of the Mississippi River, but in lieu thereof, the divisions prescribed in appendix C shall apply.

Nothing in this report and order shall be interpreted as precribing divisions of rates to and from points on the Durham and Winston-Salem districts of the Norfolk and Western Railway Company.

When intermediate switching service of the Terminal Railroad Association of St. Louis, the Alton and Southern Railroad, the Illinois Terminal Railway Company, or motor carrier service is necessary to effect interchange at St. Louis or East St. Louis, the applicable charges for such service shall be payable from the eastern primary division on westbound shipments and from the western primary division on eastbound shipments.

APPENDIX C

Intraterritorial divisions and subdivisions prescribed between complainants and defendants in Sub-Nos. 1, 2, and 3

Scales of Divisional Factors

Miles	1	2	3	Miles	1	2	3
50	65	---	72	1,100	318	292	350
100	77	---	85	1,150	330	304	363
150	89	---	98	1,200	342	316	376
200	101	75	111	1,250	354	328	389
250	113	87	124	1,300	367	341	404
300	125	99	138	1,350	379	353	417
350	137	111	151	1,400	391	365	430
400	149	123	164	1,450	403	---	443
450	161	135	177	1,500	415	---	457
500	174	148	191	1,550	427	---	470
550	186	160	205	1,600	439	---	483
600	198	172	218	1,650	451	---	496
650	210	184	231	1,700	463	---	509
700	222	196	244	1,750	475	---	523
750	234	208	257	1,800	487	---	536
800	246	220	271	1,850	499	---	549
850	258	232	284	1,900	511	---	562
900	270	244	297	1,950	523	---	575
950	282	256	310	2,000	535	---	589
1,000	294	268	323	2,050	547	---	602
1,050	306	280	337	2,100	559	---	615

DEFINITIONS

Mountain-Pacific territory includes the States of Arizona, California, Idaho, Montana, Nevada, New Mexico (except points on and east of the line of the AT&SF between Raton, N. Mex., and El Paso, Tex.), Colorado (except points on and east of the Colorado & Southern and paralleling railroads between Cheyenne, Wyo., and Trinidad, Colo.), and Wyoming (except Gillette, Casper, and Cheyenne and points east thereof). See *Class Rates, Mountain-Pacific Territory*, 296 I.C.C. 555, 559.

Midwestern territory includes all territory between mountain Pacific territory and official or southern territory.

The "border" of any territory refers to the points through which a shipment moves. When a shipment moves over lines of railroad which constitute the border of mountain-Pacific territory, the point of interchange shall be considered the border point.

PRESCRIBED DIVISIONS

(*a*) Primary divisions of intraterritorial rates shall be percentages determined by use of the scales of prorating factors hereinabove set forth.

(*b*) The factor for the haul in mountain-Pacific territory shall be that shown in column 3 for the short-line distance between the point of origin or destination in transcontinental territory and the border between mountain-Pacific and midwestern territories. The factor for the haul in midwestern territory shall be that shown in column 1 for the short-line distance between the point of origin or destination in midwestern territory and the border between that territory and mountain-Pacific territory.

(*c*) When a shipment is interchanged between a complainant and a defendant at a point within midwestern territory, the primary division for the haul in such territory determined as provided in paragraph (*b*) shall be subdivided as follows: The factor for the haul of the line performing origin or destination terminal service in midwestern territory shall be that shown in column 1 for the short-line distance between the point of origin or destination and the point of interchange, and the factor for the intermediate haul shall be that shown in column 2 for the short-line distance between the point of interchange and the border of mountain-Pacific territory.

(*d*) Subdivisions of western primary divisions of interterritorial rates between official and mountain-Pacific territories prescribed in appendix B shall be determined as follows: The factor for the haul in mountain-Pacific territory shall be that shown in column 3 for the short-line distance between the point of origin or destination in mountain-Pacific territory and the border between that territory and midwestern territory, and the factor for the haul in midwestern territory shall be that shown in column 2 for the short-line distance between the aforesaid border and the border of official territory. On an interterritorial shipment interchanged between a complainant and a defendant at a point within midwestern territory the intermediate subdivision determined as provided in the next-preceding sentence shall be further subdivided by applying to the respective hauls the factors shown in column 2 for the short-line distances between the territorial borders and the point of interchange within midwestern territory.

(*e*) In no case shall a primary division be less than 15 percent, and in disposing of fractions of 1 percent the odd 1 percent should be added to the percentage which contains the larger decimal or, if the percentages contain equal decimals, 1 percent should be added to the odd-numbered percentage, provided, however, that if the parties so agree, percentages including decimal fractions may be established.

(*f*) The parties may, if they so agree, establish percentages other than those determined as herein provided for the purpose of grouping or equalization of gateways.

NOTES

The prescribed divisions shall not apply on traffic interchanged at Chicago by The Atchison, Topeka and Santa Fe Railway Company and the Chicago and North Western Railway Company subject to special divisions heretofore agreed upon by those companies.

The prescribed divisions shall not apply on traffic which is reconsigned or is subject to transit arrangements involving unusual out-of-line or back-haul service and is now subject to special divisions, referred to in exhibit MW-140, appendix E, as amended.

[fol. 1179]

The prescribed divisions shall not apply on traffic subject to joint rates in which The Texas and Pacific Railway Company (including its subsidiaries) and cross-complainants in No. 31503 (Sub-No. 1) solely participate.

[fol. 1180]

BEFORE THE

INTERSTATE COMMERCE COMMISSION

GENERAL SESSION

Washington, D. C.

ORDER—March 21, 1963

No. 31503

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY et al.,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al.

No. 31503 (Sub-No. 1)

AHNAPEE & WESTERN RAILWAY COMPANY et al.,

v.

ABILENE & SOUTHERN RAILWAY COMPANY et al.

No. 31503 (Sub-No. 2)

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY et al.,

v.

ABILENE & SOUTHERN RAILWAY COMPANY et al.

No. 31503 (Sub-No. 3)

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,

v.

SAME.

No. 31503 (Sub-No. 4)

LOUISVILLE & NASHVILLE RAILROAD COMPANY,

v.

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY et al.

No. MC-31503 (Sub-No. 5)

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY,

v.

SAME.

It appearing, That a full investigation of the matters and things involved in these proceedings has been made, and that the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the complainants and the defendants in No. 31503 and No. 31503 (Sub-Nos. 1, 4 and 5), according

as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before [fol. 1181] July 1, 1963, and thereafter to apply, divisions of joint all-rail interstate rates for the transportation of property between points in official territory, on the one hand, and on the other, points in mountain-Pacific territory, determined as provided in appendix B to said report.

It is further ordered, That the complainants and the defendants in No. 31503 (Sub-Nos. 1, 2, and 3), according as they participate in the transportation be, and they are hereby, notified and required to establish, on or before July 1, 1963, and thereafter to apply, divisions of joint all-rail interstate rates for the transportation of property between points in midwestern territory, on the one hand, and on the other, points in transcontinental territory (including Montana) determined as provided in appendix C to said report.

It is further ordered, That the said complainants and defendants be, and they are hereby, notified and required to cease and desist, on or before July 1, 1963, and thereafter to abstain, from asking, demanding, collecting, or receiving divisions of said joint rates upon bases other than those hereby prescribed.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

Harold D. McCoy, Secretary.

(Seal)

[fol. 1182]

Service Date
June 24, 1963

BEFORE THE
INTERSTATE COMMERCE COMMISSION
GENERAL SESSION
Washington, D. C.
ORDER—June 20, 1963

No. 31503*

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY et al.,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al.

Upon consideration (a) of the record in the above-entitled proceedings, the report and order of March 21, 1963, and the order of April 12, 1963, herein; (b) of the petition of Mountain-Pacific carriers, defendants in the said proceedings, for modification of the effective date of the order of March 21, 1963; (c) the reply (treated as concurring petition) of the defendants St. Louis-San Francisco

* This order also embraces Docket No. 31503 (Sub-No. 1), Ahnapee & Western Railway Company Et Al. v. Abilene & Southern Railway Company Et Al., No. 31503 (Sub-No. 2), Chicago, Burlington & Quincy Railroad Company Et Al. v. Abilene & Southern Railway Company Et Al., No. 31503 (Sub-No. 3), Chicago, Milwaukee, St. Paul & Pacific Railroad Company v. Same, No. 31503 (Sub-No. 4), Louisville & Nashville Railroad Company v. Akron, Canton & Youngstown Railroad Company Et Al., and No. 31503 (Sub-No. 5), Cincinnati, New Orleans & Texas Pacific Railway Company v. Same.

Railway Company and Missouri-Kansas-Texas Railroad Company; (d) the replies of the complainants in No. 31503 and No. 31503 (Sub-No. 4) and a reply of the Mountain-Pacific carriers; (e) of a motion of the St. Louis-San Francisco Railway Company and the Missouri-Kansas-Texas Railroad Company to strike the reply of the eastern complainants filed May 20, 1963; and (f) of the undertaking and commitment of the said eastern complainants in and by their said replies, if the present effective date of the order of March 21, 1963, is not modified as respects the primary divisions on their traffic, to make resettlement thereof on shipments moving on and after July 1, 1963, to the basis of such modified primary divisions favorable to western lines defendants as a group as may thereafter be prescribed herein, with interest at the rate of 6 percent per annum from the customary accounting monthly settlement dates;

It is ordered, That the order of March 21, 1963, shall continue in effect until the further order of the Commission;

It is further ordered, That the said petition of the Mountain-Pacific carriers and the concurring petition of the St. Louis-San Francisco Railway Company and Missouri-Kansas-Texas Railroad Company be, and they are hereby, denied;

[fol. 1183] *It is further ordered,* That the motion of the St. Louis-San Francisco Railway Company and the Missouri-Kansas-Texas Railroad Company to strike be, and it is hereby, denied;

It is further ordered, That the definition of Mountain-Pacific territory in Appendix C to the report of March 21, 1963, be, and it is hereby, amended to read as follows:

> Mountain-Pacific territory includes the States of Arizona, California, Oregon, Washington, Idaho, Montana, Nevada, New Mexico (except points on and east

of the line of the AT&SF between Raton, N. Mex., and El Paso, Texas), Colorado (except points on and east of the Colorado and Southern and paralleling railroads between Cheyenne, Wyo., and Trinidad, Colo.) and Wyoming (except Gillette, Casper, and Cheyenne and points east thereof). See *Class Rates, Mountain-Pacific Territory,* 296 I.C.C. 555, 559.

And it is further ordered, That the second ordering paragraph of the order of March 21, 1963, be, and it is hereby, amended to read as follows:

It is further ordered, That the complainants and the defendants in No. 31503 (Sub-Nos. 1, 2, and 3) according as they participate in the transportation be, and they are hereby, notified and required to establish, on or before July 1, 1963, and thereafter to apply, divisions of joint all-rail interstate rates for the transportation of property between points in midwestern territory on the one hand, and on the other, points in transcontinental territory (including Montana) and subdivisions of primary divisions of joint rates between Official territory and Mountain-Pacific territory prescribed in the next-preceding paragraph determined as provided in Appendix C to said report.

By the Commission.

Harold D. McCoy, Secretary.

(Seal)

[fol. 1184] BEFORE THE

INTERSTATE COMMERCE COMMISSION

Service Date
January 22, 1964

No. 31503[1]

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY et al.,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al.

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1. Findings in prior report of March 21, 1963, modified on reconsideration. Order entered.

2. Petition of complainants Missouri-Kansas-Texas Railroad Company and St. Louis-San Francisco Railway Company for further hearing denied.

Appearances as shown in prior report.

[fol. 1185] No. 31503

SUPPLEMENTAL REPORT OF THE COMMISSION—Decided December 31, 1963

HERRING, *Commissioner*:

In our original report and order in these proceedings, dated March 21, 1963, we prescribed a comprehensive re-

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[1] This report embraces also No. 31503, (Sub-No. 1), Ahnapee & Western Railway Company et al. v. Abilene & Southern Railway Company et al.; No. 31503, (Sub-No. 2), Chicago, Burlington & Quincy Railroad Company et al. v. Abilene & Southern Railway Company et al.; No. 31503, (Sub-No. 3), Chicago, Milwaukee, St. Paul & Pacific Railroad Company v. Same; No. 31503 (Sub-No. 4), Louisville & Nashville Railroad Company v. Akron, Canton & Youngstown Railroad Company et al.; and No. 31503, (Sub-No. 5), Cincinnati, New Orleans & Texas Pacific Railway Company v. Same.

adjustment of divisions, including certain subdivisions thereof, of joint rail rates between transcontinental territory as defined in the report, on the one hand, and eastern and midwestern territories, on the other hand, effective July 1, 1963. A petition for postponement of that date, filed by the transcontinental defendants, was denied by our order of June 20, 1963, which also clarified the findings and order. Later a three-judge United States District Court for the Southern District of California, Central Division, granted an interlocutory injunction against enforcement of our orders, subject to the condition that if they were later permitted to become effective as of July 1, 1963, the eastern and midwestern complainants would be indemnified.

Later a number of petitions were filed by various interested parties seeking reconsideration of our findings and orders, some of which are of broad scope and others are directed to comparatively minor and incidental features. Replies to those petitions were also filed by opposing parties. These petitions and replies are more fully referred to *infra*.

[fol. 1186]

Petitions of the Transcontinental Rail Carriers and Mountain-Pacific State Commissions

These petitioners are the intervening State Commissions referred to in our original report and the Arizona Corporation Commission which was permitted to intervene thereafter and the rail carriers which were both defendants and cross-complainants in No. 31503 and Sub-No. 1. The Chicago, Milwaukee, St. Paul and Pacific Railroad Company (CMStP&P) is not among those carriers, although it has a line extending to the Pacific Northwest. In these proceedings it has chosen to align itself with the midwestern railroads, and for that reason statistics relating to its operations have not been included in various comparisons pertaining to transcontinental transportation except as

specifically indicated. Its participation as a transcontinental carrier in the traffic considered here is so small as to be negligible, as indicated in the original report.

The prayers in these petitions are that we reconsider our findings, presumably so as to maintain the present divisions of the defendants. The contention previously advanced by them and the intervenors other than the California Public Utilities Commission that the defendants should receive an increase in revenue of 10 percent from the divisions under consideration is not renewed. The California Commission expressly disclaims such a contention.

Most of the criticisms of our report contained in these petitions pertain to matters which, we believe, were sufficiently discussed in that report. However, certain features thereof deserve some further explanation in the light of the petitions.

[fol. 1187] *Cost of Service*—It is charged that our report "deals with the cost issues in total disregard of the physical facts which compel the movement of transcontinental traffic over a series of mountain ranges in mountain-Pacific territory as contrasted with the low-cost bridge service across the midwest and the movement in the portion of the East where the terrain is level."

Here, as in most similar cases, all three contending groups presented voluminous evidence describing the physical conditions relating to railroad operation. Any attempt to draw conclusions from this evidence appeared unnecessary in view of the large amount of cost evidence based on territorial Rail Form A computations which relate all of the costs to all of the work units for each group of roads, and thus automatically reflect for each group the ultimate effect on costs of all operating conditions and other physical features, such as mountains, plains, and intermediate or bridge operations.

The restatement of costs contained in our report is based on the defendants' costs, applied to defendants' traffic study, and includes their Rail Form A applications which

reflect territorial differences, embracing their adjustment for fuel consumption based on grades and curves considered necessary to allow for onerous operating conditions in mountain territory, and their wage, fuel, and line-haul switching adjustments which, they say, reflect bridge service. Furthermore, the restatement includes all of their other adjustments except the six which were rejected. These will be further considered *infra*.

[fol. 1188] The defendants contend that the above rejection unlawfully imposed an unjust burden of proof upon them, and that our proper course should have been (1) to dismiss the complaints for lack of reliable evidence, (2) to accept their evidence in the absence of offsetting proof from their opponents, or (3) to order the latter to produce certain data in their possession thought to bear on the question. Whether we could lawfully or properly follow the third course in adversary proceedings based on formal complaints is not clear. We have taken action of that kind occasionally in investigations on our own motion, where it appeared necessary to assume some responsibility for the development of the record. In the prehearing conference in the instant cases the advisability of instituting an overall general investigation was discussed but the defendants opposed the suggestion, and the matter was dropped. Upon the facts of record as a whole we believe that the existing divisions are shown to be unjust, unreasonable, and inequitable and that justice would not be served by dismissal of the complaints. Nor do we see in the record any basis for assuming that the eastern and midwestern complainants withheld vital evidence merely because they had different conceptions of the nature and extent of facts to be developed.

The discussion of the six components of the defendants' cost studies for which we made substitutions covered approximately one-fourth of our original report. It was based

entirely on evidence of record and at this point only a few additional comments seem necessary.

[fol. 1189] (1) The defendants contend that our use of the so-called 7-day studies in lieu of their special studies of empty return movement was erroneous. It is difficult to ascribe the empty movement of a car to a particular commodity or class of traffic because of the variety of the lading, and the fact that cars used occasionally for hauling transcontinental traffic may at other times serve widely different uses, including local movements within each territory as well as to, from, and between other territories. The defendants urge that insufficient consideration was given to special cars, such as those used for automobile parts, which are assumed to have an empty-return movement of approximately 100 percent. They would be included in the 7-day studies, tending to increase the empty-return ratios in all territories. Here they accounted for only about 4 percent of the total movement, contrary to the situation mentioned in our report in *Louisville & N. R. Co.* v. *Akron, C. & Y. R. Co.*, 309 I.C.C. 491, 506, 509.

Many special studies of empty-return movement were undertaken in these proceedings, each showing a different result. The deficiencies in the defendants' studies of general-purpose boxcar empty return, as stated in our prior report, are so serious in our opinion as to render them without value. We adhere to our prior finding that the 7-day studies made under an order of the Commission and based on uniform instructions to all the railroads as to how the studies were to be made, afford a more reliable basis of comparison among territories. Moreover, on the basis of the evidence in this record, the 7-day studies provide appropriate comparative ratios to the traffic in issue.

[fol. 1190] (2) The defendants contend that in our treatment of roadway costs we were guilty of an "irrational departure from previously accepted principles." They find those principles in an observation made in a report dealing

with transcontinental divisions on a record made in 1929 and earlier years, in which certain system-average statistics were criticized, *Divisions of Freight Rates,* 203 I.C.C. 299, 335. We do not interpret that report as affording defendants the broad support for their methods which they claim. Nor can we attach authoritative significance to a quoted statement by their principal cost witness made at an informal prehearing conference in 1940 when he was a member of our staff.

In essence the theory of the defendants is that there is a single constant cost for "maintenance of way and structures—running" applicable to each mile of track anywhere in the United States regardless of the effect on costs of such features as grades, curves, and tunnels. The reliability of the defendants' computations is dependent on 4 assumptions: (a) that there is a "constant" expense for all track mileage in the country *which does not vary* with density; (b) that this "constant" is the same for *all* railroads in *all* sections; (c) that total roadway expense varies *directly* with density, the relationship being shown graphically as a straight line and not a curve; and (d) that the "constant" per track-mile can be determined by regression. Our inability to accept the validity of these assumptions was based on evidence of record, and was, we believe, sufficiently explained in the original report. Additionally, it should be noted that in spite of the greater cost per mile [fol. 1191] of maintaining roadway with grades, curves, and tunnels in mountains than in plains territory, the cost per thousand revenue gross ton-miles was $0.6178 in mountain-Pacific territory and $0.6893 in midwestern territory. The defendants assume, and wish us to accept as a fact, that this greater cost in the Midwest is caused by a large proportion of branch line mileage which is not used by the traffic at issue but which increases the territorial average cost.

The following information which is based on railroad system totals for the year 1956 should clarify this issue:

Item (1)	Source MW-743, Part I Sheet 4 (2)	Mountain Pacific (3)	Mid-western (4)
1 Percent that branch line mileage is of total mileage of all lines	line 1(c)	31.5%	31.7%
2 Percent that branch line traffic is of all traffic (trailing ton-miles)	line 5(c)	2.0%	3.1%
3 Main line density (freight MTTM per mile of running track operated)	line 7(b)	8,474	4,804

These figures show that the proportion of branch line mileage for each group is almost the same and the amount of traffic on branch lines is so small that some other factors cause the lower unit cost in mountain-Pacific territory. The principal factor is clearly the high density of traffic, 76 percent higher than the Midwest.

[fol. 1192] Although the cost per mile may be somewhat higher in mountainous territory, this higher cost is shared by so many more tons of traffic that the cost per ton-mile is lower.

It is the light density on the main lines in the Midwest which causes the higher costs. These lines are used by bridge traffic, and it is, therefore, quite correct to charge this bridge traffic with its proportionate share of maintaining the lines over which it moves.

On page 33 of the former report we said:

> The information available from both the abandonment dockets and the light-density class II roads shows a definite relationship between density and constant

> cost per mile of track, i.e., the higher the density the greater the constant cost.

Defendants' interpretation of this sentence as meaning that constant cost is variable with changes in service units was not intended. We therefore clarify it to read as follows:

> The information available from both the abandonment dockets and the light-density Class II roads shows a definite relationship between density and constant cost per mile of track, and that the constant cost per mile is different for each density group, the constant for the lower density groups being smaller than those for the higher density groups.

The general principle is that although constant cost does not vary with individual units of output, a given actual amount (body) of constant cost is valid only at a particular level of output and for a specific size of plant facility, and that when either changes substantially the actual amount of constant will be different and the relationship between out-of-pocket and constant costs should be analyzed for each level of traffic, i.e., density.

[fol. 1193] (3) Criticizing the treatment of locomotive costs in our restatement, the defendants raise two questions:

> (a) Why the selection of "the gross ton mile method" instead of diesel unit-mile basis; and (b) Why the substitution of territorial average locomotive costs for the cost per diesel unit-mile employed in the mountain-Pacific lines' study.

The gross-ton-mile method is employed in applying Rail Form A, and more adequately reflects the service performed by locomotives in the respective territories which contain differing geographic operating characteristics. Apart from that fact, there was evidence here supporting

its use, some of which based on fuel consumption was introduced by the defendants in an early stage of the hearings. They urged that the best method of assigning locomotive costs was on the basis of fuel consumption. The use of a fuel consumed basis produces about the same relative costs as the gross-ton-mile basis. Later the defendants switched to the diesel unit-mile basis claiming it should produce the same results as the fuel consumed basis. We consider the unit-mile basis unconvincing in the light of the evidence that the diesel unit-mile basis of computing locomotive costs has two weaknesses: first, a common unit cost was used by defendants for all three territories thereby concealing territorial differences, and second, the assignment of diesel units was on a theoretical rather than an actual basis in mountain-Pacific and official territories.

Our substitution of the respective territorial average locomotive costs in lieu of a common unit cost for all 3 territories favored by the defendants was made in the belief that their method concealed territorial differences which the study was ostensibly intended to disclose.

[fol. 1194] (4) The comments in the next preceding paragraph apply also to our reliance on the Rail Form A car-mile cost, which indicates the actual costs of individual roads, aggregated by groups. This approach, we believe, more reliably reflects relative car-repair expense in the compared territories than the uniform cost used by the defendants in their study.

(5) The defendants criticize our rejection of their theory that certain of their branch lines should be considered exclusively useful for transcontinental traffic, which was therefore chargeable with 100 percent of the expense of their facilities and operation. As fully explained in our original report, we were unable to accept the premise that a proportion of as little as 50 percent of such traffic on a branch indicates such a degree of dependence thereon as

to support the differentiation. As we recognize the "solely related" concept, two conditions must be met in its application: (a) that the facilities and the expenses are used and incurred exclusively (100 percent) for the traffic or service, and (b) that the facilities and expenses would be eliminated with the disappearance of the traffic or service.

The transcontinental lines' "solely related" branch lines and short lines do not meet the above conditions. The lines treated as "solely related" by defendants needed to be only 50 percent "related" to transcontinental traffic. The branch lines and short lines are not operated exclusively for transcontinental service even in the broadest sense, and it would be impossible to eliminate the branch lines and short lines without interfering with the flow of non-transcontinental traffic. Furthermore, we criticized the methods employed in estimating the proportion of transcontinental traffic. Admittedly, the financial bearing of this point is compara- [fol. 1195] tively slight, but the principle involved justifies the attention given to it in our original report, and we are not persuaded by the defendants' petition that our views were unsound.

(6) In our original report we discussed the differences of opinion among the parties as to whether the investment base should be book investment or elements of value and whether the rate of return should be 4 percent or 6 percent. The defendants reiterate their contentions on this point, citing *Lumber from California and Oregon to California and Arizona,* 308 I.C.C. 345, 362, where we said that return for the use of capital to provide equipment and other property was an element of transportation cost, pointing out that the respondents there (defendants here) had included nothing for return on investment in a cost study intended to prove that their proposed rates were not below a reasonable minimum. We therefore added a cost of return at 4 percent, a figure widely used for such purposes. We regard it as fair for present purposes.

Generally it is the view of the defendants that our restatement "represents a new cost study that has not been tested either by affording the parties an opportunity to check the calculations, or by permitting cross-examination with respect to the judgments or assumptions underlying the figures." They assume that there must be essential working papers and other data in our files to which they should have access to determine whether the restatement was calculated correctly.

Our substitutions before referred to closely reflect the record and no other data were resorted to. All the costs [fol. 1196] shown in our original report, and specifically the restated costs and Rail Form A costs in columns (3) and (4) on page 41 thereof, are based on the cost evidence of record as shown by Appendix D hereto. The defendants' contentions furthermore reflect a view which differs from ours as to the weight to be accorded the cost evidence of record. The purpose of the defendants' study was to support their argument that, not only should their revenues from this traffic not be reduced, but that those revenues should be increased 10 percent by the establishment of new divisions based on distance scales which, they said, would produce that result. The evidence used in our restatement was convincing that their studies as presented could not justly be given the intended weight. Also consideration of the restatement indicated with some force that revenues of the eastern and midwestern lines derived from the present divisions are too low in relation to costs.

Revenue Need—The petitioning defendants claim that:

> Where the Commission undertakes to base a change in divisions on the ground of "revenue need," it is axiomatic that the Commission must: (1) find the amount of revenue which its order would transfer; (2) find that such a transfer is necessary to meet the fair proportion of the complainant carriers' revenue that should be met from the traffic at issue; and (3) find that the transfer will not unduly impair the de-

fendant carriers' ability to meet their own revenue needs. None of these findings are made in the report in this case. The report does not even find the overall revenue effect of its order much less its effect on individual roads. The report of one dissenting Commissioner refers to "estimates" of revenue effect (sheet 89) but the source and nature of such "estimates" is not revealed. Nor is any reason given why such findings, traditionally made in other divisions cases in which the revenue need basis has been invoked (e.g., *New England Divisions,* 66 I.C.C. 196, 206, affirmed 261 U.S. 184 (1922)), have not been made in the present case.

[fol. 1197] These contentions are grounded on erroneous assumptions of fact and of law. Our prescription herein of just and equitable divisions for the future is in no sense a "transfer" of money nor is it based solely on revenue needs. As the Supreme Court stated in *Interstate Commerce Commission* v. *Hoboken R. Co.,* 320 U.S. 368, at 381, where carriers are unable to agree as to divisions, the prescription thereof for the future "is not a mere partition of property" but "is one aspect of the general rate policy which Congress has directed the Commission to establish and administer in the public interest."

There is no single yardstick or criterion which can be employed in determining fair divisions. *Baltimore & O. R. Co.* v. *United States,* 298 U.S. 349, 359. The question of what constitutes just and reasonable divisions involves the making of practical judgments and cannot be solved as though it were a mathematical problem. *Boston & Maine R.R.* v. *United States,* 208 F. Supp. 661, 675. In every divisions case it is customary to receive evidence relating to revenue need, the term which briefly covers "the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation."

Our authority under the above provision of section 15(6), which requires due consideration, among other things, to revenue need, is not limited in concept or scope. We are thereby authorized "to take into account and give due weight to revenues from all transportation service, the operating expenses and taxes chargeable to the same and the amounts available as compensation for the use of all carrier property," as well as "the revenues, expenses, taxes and re- [fol. 1198] turns attributable to the service covered by the divisions under consideration." *Baltimore & O. R. Co.* v. *United States,* 298 U.S. 349, 360, 370. We are free to give such evidence the weight which the particular circumstances appear to justify. In our determination herein we have received and considered evidence in relation to these as well as all factors concerning the public interest in maintaining all essential parts of the transportation system in effective working condition, including the beneficial and alleged detrimental aspects of the prescribed divisions. We reject petitioning defendants' contention concerning their greater costs and revenue needs as unsupported by evidence of record. In our opinion there is no substantial evidence which would warrant a finding either that they are entitled to an increase in their divisions or that the present divisions are fair and should be maintained. The evidence of record is substantially to the contrary.

There is no rule, statutory or otherwise, requiring that, as a condition to the exercise of our authority in cases involving divisions, we must find in terms of dollar amount the difference between the revenue produced by lawful divisions as compared to the revenue produced by unlawful divisions. Nor is there authority to support the contention that such evidence as to revenue need can only be considered when it is possible to make the three findings suggested above. See, for example, to the contrary, *Divisions of Freight Rates,* 156 I.C.C. 94, 95, (order sustained without the question being raised, *Beaumont S. L. & W. Ry. Co.* v. *United States,* 282 U.S. 74); *Official-Southern Divisions,* 289 I.C.C. 4, 5.

[fol. 1199] The petitioning defendants' contention that their three suggested findings have traditionally been made in other divisions cases in which the revenue-need doctrine has been invoked is not valid. In some proceedings of limited scope there may be evidence supporting a fairly accurate estimate of additional revenue which may result from increased divisions, but this has not been true of the larger interterritorial divisions cases, such as this. In the *New England Divisions Case,* 66 I.C.C. 196, 206, cited as an example, it was possible to estimate that the temporary increase of 15 percent in the divisions of the New England railroads there ordered would increase their revenue to the extent of about $7.5 millions per year. Under the circumstances of that case the special needs of the New England lines were known and could not be met by granting a full increase in rates under Ex Parte 74, *Increased Rates, 1920,* 58 I.C.C. 220, 246-247. Our divisions order was directed to accomplishing that objective and was held by the Supreme Court to be a supplement to, or modification of, that entered in Ex Parte 74. See *New England Divisions Case,* 261 U.S. at 196. While the Commission considered and discussed how the benefit to the New England lines greatly outweighed any detriment to their western connections, there were no formalistic findings such as those which the petitioners say are essential. The inapposite reliance on that decision is evident from the dissenting opinion of Commissioner Hall (p. 209) in which he criticized the Commission for not making findings of that kind. It should be noted that in affirming the Commission's order, the Supreme Court did not require formalistic findings in that regard or as to the amount of revenue involved.

[fol. 1200] A somewhat similar question later arose in *Atlantic Coast Line R. Co.* v. *Arcade & A. R. Corp.,* 198 I.C.C. 375, 380, where the defendants therein (eastern complainants here) urged that "when 'financial needs' of weaker lines are made the controlling factor in a divisional case the Commission must specifically find that the divisions

prescribed are necessary to maintain such lines 'in effective operation as part of an adequate transportation system'." The Commission's comment was as follows:

> Nor do we understand that financial conditions can be given weight only as a kind of last-resort remedy to prevent immediate abandonment of the weaker road, as implied by this contention.

That decision was sustained in *Baltimore & O. R. Co.* v. *United States, supra,* wherein the Supreme Court found no support for the claim that the Commission had given undue weight to financial needs. To the contrary, the holding was of directly opposite tenor, stating (298 U.S. at 359-360):

> The report shows that the Commission received much evidence bearing upon the standards set by §15(6) to govern it in making the divisions. Appellants' claim that the order rests exclusively upon the southern lines' financial needs is negatived by the record. Many other facts were shown to have been presented and considered. There is no requirement that the Commission specify the weight given to any item of evidence or fact or disclose mental operations by which its decisions are reached. Useful precision in respect of either would be impossible. And it would be futile upon the record to attempt definitely to ascertain the weight assigned to any fact or argument in prescribing the divisions. We find no support for appellants' claim.

These petitioners lay much stress upon what they consider improper reference to passenger deficits in our report on the ground that there was a lack of reality in such use and no explanation of the nature and meaning of the pas- [fol. 1201] senger deficit statistics referred to. The significance of the term *passenger deficits* is well known. They have been generally regarded as having an important bearing on the financial condition of the railroads, particularly in the years since 1946 when they have amounted to an

annual total for all class I railroads ranging from about $400 million to $723 million.

The serious implications of these deficits impelled us in 1956 to institute an investigation concerning them which was the subject of a report 3 years later, *Railroad Passenger Train Deficit,* 306 I.C.C. 417, in which we said (p. 479):

> One thing, however, is abundantly clear. For more than a quarter of a century, excepting the brief span of World War II, the expense of performing this service has regularly exceeded associated revenues. The financial loss is real; it is large and appears to be growing; and it endangers the present and future welfare of the railroad industry.
>
> Nothing can be gained by ascribing blame to any particular circumstance or interest. The causes are many and complex—no single one more culpable than any of the rest. Yet, if this threat to realization of the objectives of the national transportation policy is to be substantially lessened, responsible efforts in this direction must reckon with facts as they are. If the statistical trends of 25-odd years prove any one thing, it is the folly of awaiting more fortuitous events.

In a statistical table appended to that report it was shown that in the 10 years between 1947 and 1957, when the deficit reached its peak, the increase for the United States as a whole was 23 percent, for the eastern district 12 percent, and for the western district 37 percent. This is the period principally covered by the statistics of record, and the showing is relevant to any comparison of railroads in the eastern and western districts pertaining to financial condition.

[fol. 1202] The figures comparing passenger deficits and net railway operating income from freight service set forth in our original report, which the petitioners criticize, did not exhaust the evidence of record bearing on this point. From the various financial exhibits presented by the mid-

western complainants it is possible to compute the passenger operating ratios of all transcontinental class I defendants and the eastern class I complainants which performed passenger service for years before 1959, and they are shown in the following table together with ratios for the United States and the western district taken from the report last above referred to (p. 487).

PASSENGER OPERATING RATIOS

Year	United States	Eastern district and Pocahontas region	Western district	Transcontinental defendants
1946	——	102.8	——	99.9
1947	117.47	116.3	118.99	116.8
1948	127.38	123.8	132.16	128.5
1949	136.67	129.3	147.16	143.7
1950	124.00	119.2	130.62	128.8
1951	134.19	129	141.95	143
1952	131.62	126.1	139.28	138.9
1953	137.95	127.7	152.15	154
1954	138.16	123.5	157.60	163.7
1955	137.60	125	154.81	158
1956	140.66	126.8	159.62	164.5
1957	144.41	130.4	162.76	168.8
1958	——	119.9	——	160

These figures are significant in their showing that in the peak year 1957 the passenger operating ratio of the transcontinental lines was 44.5 percent greater than it was 10 years earlier, a much larger increase than that of any other [fol. 1203] group. This increase was responsible for what those lines term their "relative static earnings" and their "revenue need problem," evidenced by their purported average rate of return of 3.94 percent in 1948-1957, compared with 3.91 percent in 1947. In the same 10 years their average freight revenue per annum was 28 percent higher than the

figure for 1947, the corresponding increase for the other railroads of the United States being 16 percent. Their freight operating ratio in this period was 64.6 percent compared with 67 percent in 1947.

In our discussion of passenger deficits there was no "departure from prior norms" said to have been recognized in past decisions relating to freight rates or divisions thereof, as the defendants charge. In *Increased Freight Rates, 1948,* 276 I.C.C. 9, which they cite, the Commission discussed passenger deficits in considerable detail, saying:

> As will be shown, the passenger service presently appears to be conducted at a substantial loss, considering the railroads as a whole. As here only freight rates and charges are in issue, the users of that service insist that they shall not be required to bear the burden of the passenger deficit, and take the position that each branch of the service should pay its own way, or in any event, the deficit should be localized to the roads or territories in which the loss from passenger traffic is most pronounced. (p. 32)

In 1948 passenger operating ratios in the West were higher than those in the East, but it was not feasible in that proceeding to localize the deficits as above suggested. The Commission said (p. 35) that "we have felt compelled in a general rate case to take the passenger deficit into account in adjustment of freight rates and charges * * * and revenue [fol. 1204] losses or deficits on the one necessarily must be compensated by earnings on the other if the carriers are to continue operations."

Due in part to the general rate increase of 1948 and others in later years the average annual freight revenue of all class I railroads in the 10-year period, 1949-1958, was 20 percent higher than it was in the 3 years, 1946-1948. The increase for the eastern railroads was 14 percent and for those in the western district it was 26 percent. In 1957 the passenger operating ratio of the western district was 23

percent higher than it was in 1948, and the increase in that of the eastern lines in the same period was 5 percent. These differences are necessarily and unfairly obscured by comparing only the net railway operating income from all services in considering the respective revenue needs of the two groups.

In numerous cases involving divisions the Commission has given consideration to unequal passenger operating ratios as bearing on the respective revenue needs of the contesting groups. The first major instance was *Divisions of Freight Rates,* 148 I.C.C. 457, affirmed 282 U. S. 74. The opponents in that case were southwestern railroads and western trunk lines. After stating that neither group was receiving a return of 5.75 percent the Commission said (p. 474):

> The problem is to spread this deficiency between freight and passenger service on a basis fair for present purposes of comparison. The statistics show that the relation between freight and passenger revenues was about the same in both groups, but that the passenger operating ratio was slightly higher in the western trunk-line group than in the Southwest. We [fol. 1205] have, therefore, first apportioned to passenger revenues in the former group enough of the deficiency to make the passenger operating ratio the same as in the Southwest, and have then apportioned the remainder between the two services in the ratio of their revenues as thus modified. In the case of the southwestern group, we have apportioned the deficiency between the two services in the ratio of their revenues without such prior modification.

This method of allowing for different passenger operating ratios in determining just divisions of freight rates has been followed in numerous decisions. The first such instance was *Atlantic Coast Line R. Co.* v. *Arcade & A. R. Corp.,* 194 I.C.C. 729, 753, 755, where the Commission said:

> Defendants contend that the slightly less favorable financial situation of the southern roads, disclosed by this study, is due to losses of passenger revenue and that the official lines should not be called on to absorb the passenger deficiency in the South through a readjustment of divisions of freight rates. With this contention there is little room for disagreement. * * * Defendants' suggestion that comparisons of earnings should take into account the indicated greater profit from passenger service in the eastern district is of more merit.

The same principle and statistical method was also employed in the following later decisions: *Southwestern-Official Divisions,* 216 I.C.C. 687, 698, 708; *Florida East Coast Ry.* v. *Atlantic Coast Line R. Co.,* 235 I.C.C. 211, 236-7; *Official Western Trunk Line Divisions,* 269 I.C.C. 765, 772; *Gardner* v. *Akron, C. & Y. R. Co.,* 272 I.C.C. 529, 573 ff.

Making allowance for such differences in comparing net railway operating income from all services cannot be interpreted as implying a need for "wholesale discontinuance of passenger service," as the petitioners charge. We regard them as important in connection with the claimed revenue needs of the transcontinental defendants discussed in our [fol. 1206] original report. Furthermore, they refute the contention that controlling weight should be given to comparisons of net railway operating income from all services in 1955, 1956, and 1957 when the disparity in the passenger operating ratios of the eastern and western railroad groups reached its maximum.

The Prescribed Divisions.—The petitioning defendants say that there is a lack of any rational basis for the newly prescribed divisions. Urging that we did not correlate the prescribed divisions with any findings respecting relative costs or relative revenue needs, they claim that the primary error in the prescription of the new divisions between offi-

cial and transcontinental territories lies not with the mechanics of the groupings but in the percents prescribed.

We found it inadvisable to use a mileage scale for determining such divisions for the principal reason that it seemed desirable to maintain the existing groups agreeing with the defendants "that the present group basis of publishing transcontinental divisions is highly desirable in the light of competitive conditions affecting the routing of transcontinental traffic." Our substitution of three groups in transcontinental territory for the single group in effect today corrects an inequitable existing situation in which the revenue received by the defendants from eastern-transcontinental rates on shipments to and from intermediate territory, i.e., Phoenix, Ariz., Spokane, Wash., and Reno, Nev., is relatively greater in comparison with transportation service than the amounts which they receive on traffic to and from Pacific Coast port districts. The groupings provided in Appendix B reflect in a general way the gradation of the [fol. 1207] rates proposed by the railroads and approved by the Commission in *Class Rates, Mountain-Pacific Territory,* 296 I.C.C. 555. From the standpoint of distance and cost of service they are preferable to the blanketing of transcontinental territory in one group.

The petitioning defendants criticize this structure and concept of our original report, claiming as irrational "reliance upon class rates for groups and ignoring differences in class-rate levels for divisions" in Appendix B, and "ignoring groupings and recognizing a difference in class rate levels for divisions" in Appendix C. In the prescription of just and equitable divisions the matter of rate level is not controlling since our objective is to prescribe fair proportions of revenue whether the rates be on a high or a low level. In fixing such proportions it is the relative contribution of the parties, in terms of costs, that furnishes the initial indication of what is just and equitable among the carriers. With respect to the alleged failure to employ groupings in Appendix C, the record will not permit a com-

plete prescription of divisions on a group basis therein since the present midwestern groups are not well defined.

In determining just, reasonable, and equitable divisions herein, the process we employed was one of practical judgment and not of mere mathematical computation. We found it impossible to use any existing divisional scale, a cost scale, or any method suggested by the parties as an exclusive guide or specific pattern for the divisions to be prescribed. In our view of what the evidence shows as to the equities of the situation, we necessarily had to exercise our [fol. 1208] judgment. For example, the cost evidence indicated that the present divisions gave the eastern carriers a smaller margin of revenue above out-of-pocket costs than those of the western carriers. The evidence concerning financial and traffic statistics also disclosed that the trend in the earning power of the eastern roads as freight carriers since the end of World War II has been much less favorable than that of the western roads. Comparison of net railway operating income from all services, however, does not fully show that trend for the reason that the passenger operating ratios of the western roads in this period increased to a much greater extent than those of the eastern carriers. All of these elements, in our judgment, warranted an increase in the divisions of the eastern carriers, and Appendix B was formulated with that objective in mind.

There is evidence which supports the soundness of this judgment. An exhibit introduced by the midwestern lines shows group origins and destinations of 319 carload shipments in 1953 between official and transcontinental territories taken from our one-percent waybill study, on which the total revenue was $320,930. Of this amount the eastern lines received $69,928 (21.8 percent), under existing divisions, and the western lines received $251,002 (78.2 percent).

It was shown that application of the divisions recommended by the examiners would have increased the eastern share to $76,306 (23.8 percent) by an average increase in the present individual eastern divisions of 9.12 percent. The latter figure was slightly less than the average increase of

9.73 percent proposed by the examiners for the midwestern lines on midwestern-transcontinental traffic.

[fol. 1209] Upon consideration of this and other evidence of relative costs and revenue needs we concluded that the divisions recommended by the examiners on official-transcontinental traffic failed to do justice to the eastern complainants. The prescribed divisions followed the same general plan as those which were recommended in that they were based on present groups in the East and were 15 percent for the westernmost Illinois group (E-5). For movements between the E-4 group, immediately to the east, and W-1, the Pacific coast group, via Chicago the prescribed percentage is 17 in lieu of 16, as recommended. Similarly the recommended E-3 (Pittsburgh) percentage, 20, was increased to 22, and the Seaboard-New England group recommended percentage, 32, was increased to 34.

On the 319 shipments before mentioned the prescribed divisions would have yielded revenues to the eastern lines of $81,370, a little more than 25.3 percent of the total, representing an average increase of about 16.4 percent in the present divisions. On pages 41 and 45 of our original report the indicated costs of the eastern lines were shown as 26.1 percent. We are therefore of the view that from the standpoint of both cost and revenue needs the prescribed divisions are not in excess of a fair and reasonable level. They would have returned to the Eastern roads a share of the revenues slightly less than their share would have been in proportion to out-of-pocket costs based on the above traffic. We find that the divisions prescribed are necessary, in the public interest, to maintain all essential parts of the transportation system in effective working condition.

[fol. 1210] With regard to the scales of divisional factors prescribed in Appendix C for service in western territory, the petitioning defendants state that they are not properly constructed or justified by cost. This contention incorrectly assumes that the construction of a divisional scale is primarily a matter of costs and mathematics. As the Commission pointed out in *Official-Southern Divisions,* 289 I.C.C.

4, 6-7, costs do not control the contours of rate scales and in a divisions case "it is equally true that discretion and flexibility of judgment have attended the use of costs, particularly in determining the contours of divisional scales involving the relation of terminal and line-haul cost elements," and "due consideration of the respective situations of long-haul and short-haul carriers requires that the solution be based on judgment rather than formula." A similar view was recently sustained in *Boston & Maine R. R.* v. *United States,* 208 F. Supp. 661, 675, affirmed 371 U.S. 26.

The discussion in our original report, pages 84-85, makes it clear that Appendix C reflects the 29886 scale, adjusted to conform to what the evidence herein required, with 10 percent higher factors in mountain-Pacific territory. We have in the past employed rate scales as a suitable foundation for constructing divisional scales to divide joint rates [fol. 1211-12] in proportions we deem proper under the evidence. *Divisions of Freight Rates,* 156 I.C.C. 94, 96-97, 99.[1] Moreover, it is reasonable to divide the rates to some extent in accordance with the way they are made and in this case the 10 percent higher factors for mountain-Pacific territory with other adjustments give fair recognition to the evidence as to cost of service and revenue needs.

[fol. 1213] *Miscellaneous*—The defendants object to what they term the improper exclusion of eastern New Mexico from mountain-Pacific territory, which as defined in our original report included only that part of New Mexico on and west of the line of the AT&SF between Raton, N. Mex. and El Paso, Texas. That line was the boundary

[1] In addition, see *New England Divisions,* 126 I.C.C. 579, 667; *Southwestern-Official Divisions,* 234 I.C.C. 135, 138, 140; *Divisions of Rates, Official & Southern Territories,* 234 I.C.C. 175, 191; *Official-Western Trunk Line Divisions,* 269 I.C.C. 765, 777; *Official-Southern Divisions,* 287 I.C.C. 497, 527; *Official-Southwestern Divisions,* 287 I.C.C. 553, 580; *Louisville & N. R. Co.* v. *Akron C. & Y. R. Co.,* 309 I.C.C. 491, 511; *Akron, C. & Y. R. Co.* v. *Atchison, T. & S. F. Ry. Co.,* 316 I.C.C. 351, 366 (Appeal pending District Court, Colorado).

originally fixed in 1920 (*Increased Rates, 1920,* 58 I.C.C. 220, 225-6). Consistently the railroads voluntarily applied the so-called 28300 class rates to and from eastern New Mexico in accordance with the wish of the State Corporation Commission of New Mexico that this part of the State be definitely excluded from mountain-Pacific territory, *Class Rate Investigation, 1939,* 281 I.C.C. 213, 290-1. Our order instituting the investigation of mountain-Pacific class rates was broad enough to permit consideration of rates to and from eastern New Mexico, which, however, was recognized as being in 28300 territory, *Class Rates, Mountain-Pacific Territory,* 296 I.C.C. 555, 559. It was not intended to shift eastern New Mexico from 28300 territory into mountain-Pacific territory. Nor did the final order have that effect. We see no valid reason for making the change sought by the defendants.

[fol. 1214] The defendants say that "the Commission should exclude from its present order the prescription of divisions affecting any part of the competitive routes between the Missouri River and Utah gateways." What the effect of such exclusion would be is not clear, but apparently it would be far-reaching. The request is based on the expressed fear that the prescribed divisions would have a serious effect on the Denver and Rio Grande Western Railroad Company (D&RGW) whose line between Colorado and Utah junctions is a link in transcontinental routes which are competitive with lines of the Union Pacific between the Missouri River and Utah gateways. In the course of the hearings the midwestern complainants raised the question of competitive conditions affecting routes through the Utah junctions, but the defendants argued that such matters were extraneous to the issues, saying in their reply to exceptions:

> Any legitimate concern the midwestern lines may have in any threat to the equalization of divisions over Utah gateways is premature. If any problems arise as to equalization of divisions over those gateways on a

fair and equitable basis, they can be considered in the negotiations contemplated in the recommended report. If agreement can be reached as to any equalization involving divisions not here in issue, any related modification of the prescribed divisions to conform to the agreed equalization can be requested by joint petition.

The midwestern complainants are correct in stating that the "problem is left precisely where the transcontinental defendants insisted that it be left." We therefore see no reason for the modification of our findings sought by the defendants.

[fol. 1215] The defendants point out certain minor inconsistencies in the divisions prescribed between eastern groups E-1 and E-2 and western groups W-2 and W-3. Their criticism is sound, and correction has been made in Appendix B-1 *infra*. They complain of ambiguity because interchange or dividing points in northern Illinois now grouped with either Chicago or Peoria were not specifically named in our report. We there stated that no dissatisfaction with the present grouping has been expressed. The evidence indicated that Springfield and Bloomington, Ill., are now grouped with Peoria in dividing rates, but other groupings of the northern Illinois junctions were not disclosed and were therefore not specified in our report. The situation is of more immediate interest to the eastern and the midwestern complainants, which apparently consider it unimportant. The defendants say that "as to cross-lake routes other than Mackinaw City and Kewaunee, there is doubt as to which percent should be applied." It was made clear in our report that throughout the proceedings the name Kewaunee has been regarded as a designation of all west-bank Lake Michigan car-ferry terminals.

The transcontinental defendants have filed a motion to strike certain portions of the reply to their petition for reconsideration filed by the eastern complainants. Those complainants undertook to show a similarity between our

divisions prescribed for them with those which would result from application of the so-called 29886 scale to two-line movements between representative eastern and western [fol. 1216] points. It was shown that the scale divisions would be the same as those prescribed in some instances and in others slightly different. Early in the hearings the eastern complainants presented an estimate purporting to show that application of the 29886 scale based on traffic of 1953 would have increased their revenue by about 3.2 percentage points, or approximately $25 million per year. Estimating that the prescribed divisions would have produced something less than that amount if they had been in effect in 1953, the eastern complainants claim for their estimate more reliability than a projected estimate of $32 million from application of the 29886 scale shown in the defendants' evidence. Necessarily a choice between these estimates would involve assumptions concerning volumes of traffic and rate levels in the future.

The motion to strike was based on the fact that only about half of the distances used in the complainants' comparison were shown in the record. Recognizing that their use of short-line mileages for which record references were not shown might be deemed objectionable, the complainants have submitted a revised study which omits the disputed distances. In view of this substitution we consider it unnecessary to pass upon the motion.

Petition against the Order of June 20, 1963.—After issuance of our order of June 20, 1963, before referred to, which made no change in the effective date (July 1, 1963) of our original order of March 21, 1963, the transcontinental defendants filed a petition maintaining that our June 20 order was invalid for failure to give 30 days' notice as [fol. 1217] required by section 15(2) of the act and that the order should be withdrawn and replaced with a new order conforming to the requirements of the act. Replies thereto were filed by the eastern complainants in the title proceeding and the M-K-T and Frisco. In addition, replies were also filed by the midwestern complainants in the

Sub-No. 1 proceeding except the M-K-T and Frisco, embracing requests that the Commission, as a precautionary measure, issue an amending order, with appropriate recitals and a specified effective date, which would (a) amend the ultimate findings and the second ordering paragraph of the report and order of March 21 to explicitly include the subdivisions in western territory on official-transcontinental traffic and (b) amend the definition of mountain-Pacific territory in Appendix C of said report to include Oregon, Washington and Utah.

We intended our report and order of March 21, 1963, to include the above matters and believed our discussion thereof in said report and the scale of divisions and subdivisions prescribed in Appendix C with its explanatory notes, to contain sufficient explanation of our intention. It was our intent in entering the order of June 20, 1963, to clarify these matters, which we deemed to be already included in our report and order of March 21, 1963. We, therefore, felt that an additional 30 days' notice was not required. Accordingly, the transcontinental carriers' petition against the June 20 order is denied.

[fol. 1218] However, recognizing that the omission of additional more specific language in our order of March 21, 1963, has caused disagreement as to the effect of our clarifying order of June 20, 1963, and that as noted herein several changes and modifications are being made in specific divisions, we deem it advisable to set forth our entire findings on reconsideration at this time and enter a new order with an appropriate effective date. This will combine all divisions as originally prescribed and as amended or supplemented herein in one document. We desire to point out that the order entered herewith does not change the effective date (July 1, 1963), or any other provision, of our order of March 21, 1963 (as clarified by our order of June 20, 1963), and we will provide for the expiration of the order of March 21 upon compliance by the parties with the order entered herewith.

Petitions of Midwestern Railroads

A petition filed generally on behalf of carriers which are complainants in Sub-No. 1 and defendants in No. 31503 prays for reconsideration of the decision on the ground that [fol. 1219] the prescribed divisions are unduly favorable to the eastern and the transcontinental lines in the light of evidence pertaining to costs of service and revenue needs. The Milwaukee, complainant in Sub-No. 3, supports that contention in a companion petition. Other separate petitions were filed by the St. Louis-San Francisco Railway Company (Frisco) and the Missouri-Kansas-Texas Railway Company (M-K-T) differing in content from the others.

In the complaint in Sub-No. 1 it was alleged:

> 5. The financial needs of complainants are such that they require a substantially greater amount of revenue in order to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation; and their financial needs are greater than those of the carriers in Eastern Territory and the carriers west of Midwestern Territory.

To that end the petitioners proposed a readjustment of divisions which according to the best available estimates based on 1953 would increase their revenues by $38 million [fol. 1220] per year annually, about 24 percent, and afford the eastern lines an increase of $4 million per year, about 4.8 percent. They therefore express dissatisfaction with our report, which, they say, "makes substantial increases in the divisions of the eastern lines and modest increases in the divisions of the midwestern lines generally." Their criticisms are briefly summarized as follows:

> The report eliminates only part of the inflation in the divisions of the transcontinental defendants, and in its treatment of the eastern lines gives them inflated divisions which are inconsistent with the equal-factor

bases of divisions prescribed during the last 15 years between official and midwestern territories and an equal-factor basis of divisions on official-western trunk line traffic to which all eastern lines subscribed in 1955.

Of the cases here referred only one is recent, *Akron, C. & Y. R. Co.* v. *Atchison, T. & S. F. Ry. Co.*, 316 I.C.C. 351, (1962). We there prescribed an equal-factor basis as above stated, although the eastern railroads, which were the complainants, asked for a dual scale more favorable to themselves. The record was comparatively limited, and our findings were not intended to deal broadly with equities affecting the eastern and western districts as a whole. There is no reason to consider that decision controlling here. The other decisions referred to in the quotation are *Official Western Trunk Line Divisions*, 269 I.C.C. 765, (1948), and *Official-Southwestern Divisions*, 287 I.C.C. 553, (1953), in which the so-called 29886 scale was prescribed. These also were narrower in scope than the instant cases, and the records reflected conditions as they were before 1952. Neither decision establishes a principle that equal-factor bases such as these petitioners have in mind shall invariably be employed.

[fol. 1221] To measure the alleged inflation in the prescribed divisions of the eastern lines the petitioners compare them with percentages which they compute by use of the 29886 scale. Referring to a statistical table appended to their petition, they say that the prescribed divisions "reflect inflation ranging from 3.2 percent to 25.9 percent in official territory." However, in numerous instances their method of comparison discloses no inflation, and also shows deflations ranging from 3.8 percent to 17.4 percent.

Throughout these proceedings these petitioners have urged the use of the 29886 scale as a proper basis for revising all the divisions in issue and they now use it as a criterion by which to measure what they regard as inflations in the divisions prescribed for their opponents and

deflations for themselves. We rejected the unqualified use of the scale for the revision above referred to and we therefore cannot accept it as a criterion of inflation and deflation. In *Official-Southwestern Divisions,* 287 I.C.C. 553, in which it was prescribed, the average distances shown were 760 miles in the Southwest and 672 miles in the East. The extreme distance in the former territory was about 1200 miles. The midwestern complainants would apply it for distances up to 1900 miles.

The midwestern complainants show numerous examples of divisions produced by our findings which support the statement in our original report that the scales in Appendix C would result in "moderate increases in some of the most important midwestern divisions." It was our stated view [fol. 1222] that such increases were supported by the evidence concerning cost of service, but that the proposal of the midwestern lines gave undue weight to their claimed revenue need. They now reiterate their contention that "relative revenue needs of official territory lines vis-a-vis midwestern lines do not differ substantially." They show that in the period 1951-58 "adjusted net railway operating income" of the two groups was equivalent to a return of 3.39 percent on elements of value for the eastern lines and 3.24 percent for themselves. In this comparison there is no allowance for differences in passenger operating ratios in this period. The average of such ratios for the midwestern lines in 1951-58 was 148 and for the eastern 126.

Equalization—The original proposals of both the midwestern and the transcontinental carriers relating to the divisions of rates to and from midwestern territory were in the form of distance scales and included no provisions for grouping of cities or equalization of competing routes and gateways. The midwestern complainants expressly proposed that, if we prescribed divisional scales as they urged, our findings "should not be understood as preventing the carriers, by agreement, from maintaining present or establishing new groupings, or from equalizing divisions via competing routes or gateways."

The transcontinental defendants expressed general approval of divisional groups, presumably existing groups, but as before shown in this report, were opposed to any consideration of equalization in connection with our decision. They have charged us with error "in rejecting the group basis of divisions over midwestern gateways." Our rejection, if it can be called such, was merely by way of [fol. 1223] a statement that "the parties may if they so agree, establish percentages other than those determined as herein provided for the purpose of grouping or equalization of gateways."

The midwestern complainants now ask us to modify our findings for the purpose of prescribing extensive equalized subdivisions, contrary to their former position before stated. In some instances they point out certain disparities which would result from the application of any divisional scales such as those which we prescribed and ask merely that we require equalization without suggesting the proper basis therefor. In other instances they propose specific modifications of our findings which, they say, would facilitate equalization via competing routes through the same gateway. The effect of such proposed modifications, however, is far from clear.

Their requested modifications are opposed by the Frisco and the M-K-T and the transcontinental defendants, which urge in substance that they would be unfairly burdened by the midwestern plan. As all the western carriers until now have taken the position that questions concerning equalization should be reserved for their mutual consideration after our decision, there is no evidence in the record which would be helpful to us in attempting to deal with the problem at this time. The competitive conditions among the interested carriers are closely involved, and the nature of the problem therefore is such that they should make an effort to solve it themselves before invoking a regulatory remedy.

[fol. 1224] *Miscellaneous*—The midwestern lines make numerous suggestions in the interest of clarifying our findings

mostly of a technical nature. Some of these are not controversial and have been followed in Appendices B-1 and C-1.

In our original report divisions via the cross-lake routes were prescribed only for rates to and from the northern part of transcontinental territory, reflecting the evidence relating thereto. It now appears that rates over these routes apply to and from all points in that territory, are equalized with those via Chicago, and that a common basis of primary divisions should apply. Appendix B-1 has been worded accordingly.

The description of Group E-4 in Appendix B did not include a small section in northwestern Indiana. The midwestern lines ask that points on, west, and north of the line of the Elgin, Joliet & Eastern Ry. Co. (EJ&E) between Porter and Dyer, Ind., be included in midwestern territory. The eastern lines say that only points in Indiana in the Chicago switching district or on the EJ&E should be so included. Our revised definition conforms to the view of the eastern lines. We also agree with them that stations on the line of the New York Central between Chicago and Danville, Ill., are properly included in Group E-4.

Some of the eastern complainants have lines in northwestern Illinois, Missouri, and Iowa. The midwestern lines ask that the divisions to and from points on such lines be definitely placed on the intraterritorial basis, and the eastern lines offer no objection to that course. No modification of our findings appears to be necessary for that purpose.

The complaint in No. 31503 expressly excepted divisions of rates to and from stations on the Wabash in Illinois when the Wabash performs service both east and west of the [fol. 1225] Mississippi River. A note to that effect was therefore added to Appendix B. The midwestern lines ask that the note be eliminated on the ground that it is inconsistent with the treatment of points on other lines in Group E-5. That elimination would not be justified in view of the issues as framed by the complaint in No. 31503. We agree with the transcontinental defendants that the inconsistency should be cured by including in the note the other railroads

similarly situated. In such cases the origination or termination of traffic in group E-5 by such carrier should be considered to be accomplished within midwestern territory for the purposes of determining divisions and subdivisions as prescribed in Appendix C-1, paragraphs (b) and (c).

The midwestern lines ask that the grouping of Flinton, Ill., with St. Louis as a primary dividing point on interterritorial traffic be specifically authorized. It may be so understood.

The CM&StP and the Illinois Central have lines in Indiana by which they participate in transcontinental traffic substantially as eastern carriers. The midwestern lines therefore ask that the divisions of these two railroads to and from Indiana points be prescribed on the eastern interterritorial basis. Our power to do so is questionable under the issues in the complaints in Sub-Nos. 1 and 3. It is a reasonable assumption that revision of the eastern divisions would include the CM&StP and Illinois Central by voluntary action of the carriers involved.

In our original report no divisions were prescribed over routes through southern territory because of insufficient evidence. Neither the eastern complainants nor the transcontinental defendants are dissatisfied with that disposition, but the midwestern lines ask that an exception be [fol. 1226] made as to divisions over routes through southern territory via Metropolis and Cairo, Ill., by the Illinois Central. The sole evidence referred to as supporting such an exception is a showing of some movements over the Illinois Central through the South in July 1953 without other data which would be necessary to a determination of the divisions.

Petitions of the Frisco and the M-K-T

These petitioners seek modification of our findings as well as further hearing, which they consider necessary to "enable the Commission to make a ruling upon a full dis-

closure, as contrasted with a limited disclosure of the essential facts." Their object is to avoid reductions in certain of their divisions which would result from application of the prescribed basis to specified movements considered important to them.

They present an estimate from traffic studies which they have made for October 1961, after the conclusion of the hearings, purporting to show annual losses of $423,000 to the Frisco and $132,000 to the M-K-T due to the prescribed divisions. The loss of the M-K-T would be attributable to traffic to its stations from transcontinental territory, particularly lumber. On other traffic its revenue would be increased. Of the estimated loss to the Frisco about two-thirds would be on intraterritorial traffic and one-third on interterritorial.

These petitioners particularly stress their divisions on traffic which they interchange at Kansas City, Mo.-Kans., notably lumber. The routes through Kansas City to numerous southwestern points from the Northwest are not [fol. 1227] the most direct, and the divisions apparently have been influenced by competitive conditions. They apply in connection with broad groups. For example, the division from Kansas City to Dallas, Tex., on lumber is the same as that to San Antonio, Tex., the difference in distance being 277 miles.

The proposal of the midwestern complainants, based on distance scales, would have reduced some of those divisions, slightly increased some, and left others unchanged. On lumber from Eugene, Oreg., to Oklahoma City, Okla., via Kansas City, for example, the proposed midwestern division south of that point was 20.6 percent in lieu of the present 26.6 percent. The proposed reduction at Dallas was from 31.6 percent to 24 percent. Since we were unable to approve as high a general level as that of the midwestern proposal, our prescribed basis applied to these particular movements would necessarily produce larger reductions.

The petitioners say that our order "has drastically changed the mechanics of the present group basis of divi-

sions." This is incorrect, for we have expressly authorized departures from the prescribed basis to permit such grouping and equalization as interested carriers may agree upon in accordance with the wishes of the midwestern lines.

The situation to which the petitioners call attention was fully disclosed in the evidence of the midwestern lines and foreshadowed in the examiners' recommended report. The petitioners are therefore not in a position to claim that the effect of our decision was a surprise. We see no reason for making a special exception from our findings for these petitioners.

[fol. 1228] In their petition for further hearing the petitioners propose to supplement the record with statistics for the period 1958-1962 to show that *reduced divisions* would have a serious financial effect on them. They say also that a further hearing would permit consideration of proposed railroad mergers in the East. We have previously denied a petition for further hearing in these proceedings for that purpose. That ground furthermore is inappropriate here because the petitioners' reduced divisions to which they refer apply principally on intraterritorial traffic. The 3 principal groups of complainants and defendants unanimously oppose a further hearing at this time, and we agree with them that no sufficient reason has been shown.

Petition of the Wabash Railroad Company

We stated in our original report that East Hannibal, Ill., on the Wabash, is now a dividing point on interterritorial traffic, although no interchange takes place there and authorized its continued use with divisions to the eastern carriers the same as those prescribed via East St. Louis, Ill. Necessarily there also would be an equalization of the primary western divisions between a point such as San Francisco, Calif., for example, and the two primary dividing points above named. However, the subdivision resulting from our findings between East Hannibal and Kansas City, an intermediate dividing point, would be

smaller than that between East St. Louis and Kansas City because the respective distances are 199 and 276 miles.

The Wabash has filed a petition praying for a modification of our findings which would require the Kansas City-East Hannibal subdivision to be the same as that between [fol. 1229] East St. Louis and Kansas City, thus disregarding the difference of 77 miles of rail service. The midwestern lines, interested in the movement via East St. Louis, favor this equalization for competitive reasons. The transcontinental defendants having the movement west of the Missouri River are not opposed to the equalization but they criticize the proposed means of accomplishing it, saying:

> It would be more logical for the East St. Louis lines to meet the competition by reducing the East St. Louis divisions to the level of the East Hannibal divisions. Or the divisions via the two routes could be averaged, increasing the East Hannibal divisions and reducing the East St. Louis divisions. But it would be improper to protect the midwestern lines' competitive interest and increase the Wabash Railroad's revenues by increasing the divisions of the Wabash, and imposing the entire cost of the equalization on the mountain-Pacific lines.

The competitive situation here shown is similar to those involved in the proposals of the midwestern lines previously discussed. We are unable to see that the situation is so unique as to require special consideration, leaving other problems of the same kind to be taken up by the interested carriers for reasons before stated.

On shipments which move through both Chicago or Peoria and East Hannibal the midwestern lines ask that the last-named point be considered the primary dividing point. The eastern lines oppose this suggestion on the ground that the route between Chicago or Peoria and the Missouri River gateways via East Hannibal is competitive

with other routes over western lines as to which Chicago or Peoria would be the primary dividing point. We agree with the eastern view.

[fol. 1230] Findings

On reconsideration:

1. We find that the present divisions of joint rates applicable to the transportation of property between points in eastern or official territory and points in transcontinental territory (including Montana) as between the complainants in No. 31503 (including the Missouri-Illinois Railroad Company) and in *No. 31503 (Sub-Nos. 4 and 5)*, on the one hand, and the defendants in the said complaints, cross-complainants therein, and the complainants in No. 31503 (Sub-No. 1), on the other hand, are unjust, unreasonable, and inequitable.

2. We find that just, reasonable and equitable divisions in lieu of those referred to in Finding 1 would be those set forth in Appendix B-1 hereto.

3. We find that the present divisions of joint rates applicable to the transportation of property between points in midwestern territory, as herein defined, and points in transcontinental territory (including Montana), as herein defined, and present subdivisions of joint rates between points in eastern or official territory and points in transcontinental territory (including Montana) for movements within western territory, as between the complainants in No. 31503 (Sub-Nos. 1, 2, and 3) and the defendants and cross-complainants in the said complaints, are unjust, unreasonable, and inequitable.

4. We find that just, reasonable, and equitable divisions and subdivisions in lieu of those referred to in Finding 3 would be those set forth in Appendix C-1 hereto.

An appropriate order will be entered.

No. 31503

[fol. 1231] COMMISSIONER HUTCHINSON, whom COMMISSIONER BUSH joins, dissenting in part:

My views respecting the prescription of divisions at the levels fixed by the majority are set forth in my separate expression to the prior report of March 21, 1963, and I find no convincing support in the supplemental report to justify divisions at the levels established.

COMMISSIONER FREAS, dissenting:

My views concerning these proceedings, including the cost evidence submitted therein, are set forth in my separate expression to the original report, 321 I.C.C. at pp. 79-81. I adhere to my prior opinion that the record does not support the prescribed substantial changes in the existing divisions.

VICE CHAIRMAN GOFF, dissenting.

COMMISSIONER TIERNEY did not participate.

[fol. 1232] Appendix B-1

Primary Divisions Prescribed Between Eastern and Transcontinental Territories. (Including Montana)

Territorial groups in eastern territory hereinafter referred to are as follows: E-1, points heretofore embraced in the seaboard-New England group also known as groups A and B; E-2, points heretofore embraced in the interior trunkline or Syracuse group also known as group C; E-3, points heretofore embraced in the Buffalo-Pittsburgh-Bessemer groups also known as groups D and E; E-4, points heretofore embraced in the Detroit-Indianapolis-Cincinnati groups, also known as group F (except Evansville, Vincennes, and Terre Haute, Ind.), all other points in Indiana on eastern railroads not included in the Chicago switching district, and points heretofore embraced in group G; E-5, points on southern, western or eastern railroads in Illinois south and east of the line of the Atchison,

Topeka & Santa Fe between Chicago and Peoria and the line of the Gulf, Mobile & Ohio between Peoria and East St. Louis, and also Evansville, Vincennes, and Terre Haute, Ind., and other points in Indiana included in the Chicago switching district.

Territorial groups in transcontinental territory (including Montana) hereinafter referred to are as follows: W-1, points in California, Oregon, and Washington (except Spokane); W-2, Spokane, points in Nevada, Idaho, and Utah embraced in transcontinental territory; W-3, points in Arizona and New Mexico embraced in transcontinental territory; W-4, points in Montana west of and including Havre, Great Falls, Helena, and Butte; W-5, points in Montana other than those in W-4.

SECTION I

Between-	Dividing Points	Percentages East	Percentages West
1. E-1 and W-1	Chicago, Mackinaw City, or Kewaunee	34	66
	Peoria	36	64
	St. Louis	37	63
2. E-1 and W-2	Chicago, Mackinaw City, or Kewaunee	37	63
	Peoria	39	61
	St. Louis	40	60
3. E-1 and W-3	Chicago, Mackinaw City, or Kewaunee	37	63
	Peoria	40	60
	St. Louis	42	58
4. E-1 and W-4	Chicago, Mackinaw City, or Kewaunee	40	60
	Peoria	42	58
	St. Louis	41	59
5. E-1 and W-5	Chicago, Mackinaw City, or Kewaunee	44	56
	Peoria	46	54
	St. Louis	45	55

SECTION II

1. E-2 and W-1	Chicago, Mackinaw City, or Kewaunee	28	72
	Peoria	30	70
	St. Louis	31	69
2. E-2 and W-2	Chicago, Mackinaw City, or Kewaunee	30	70
	Peoria	33	67
	St. Louis	34	66
3. E-2 and W-3	Chicago, Mackinaw City, or Kewaunee	32	68
	Peoria	36	64
	St. Louis	37	63

(1097

SECTION II (Continued)

	Between-	Dividing Points	Percentages East	Percentages West
4.	E-2 and W-4	Chicago, Mackinaw City, or Kewaunee	34	66
		Peoria or St. Louis	37	63
5.	E-2 and W-5	Chicago, Mackinaw City, or Kewaunee	39	61
		Peoria	42	58
		St. Louis	42	58

SECTION III

1.	E-3 and W-1	Chicago, Mackinaw City, or Kewaunee	22	78
		Peoria	24	76
		St. Louis	25	75
2.	E-3 and W-2	Chicago, Mackinaw City, or Kewaunee	24	76
		Peoria	26	74
		St. Louis	27	73
3.	E-3 and W-3	Chicago, Mackinaw City, or Kewaunee	24	76
		Peoria	29	71
		St. Louis	32	68
4.	E-3 and W-4	Chicago, Mackinaw City, or Kewaunee	28	72
		Peoria	31	69
		St. Louis	31	69
5.	E-3 and W-5	Chicago, Mackinaw City, or Kewaunee	32	68
		Peoria	35	65
		St. Louis	35	65

[fol. 1234]

SECTION IV

	Between-	Dividing Points	Percentages East	Percentages West
1.	E-4 and W-1	Chicago, Mackinaw City, or Kewaunee	17	83
		Peoria	18	82
		St. Louis	19	81
2.	E-4 and W-2	Chicago, Mackinaw City, or Kewaunee	19	81
		Peoria	20	80
		St. Louis	21	79
3.	E-4 and W-3	Chicago, Mackinaw City, or Kewaunee	19	81
		Peoria	22	78
		St. Louis	25	75
4.	E-4 and W-4	Chicago, Mackinaw City, or Kewaunee	23	77
		Peoria	24	76
		St. Louis	26	74
5.	E-4 and W-5	Chicago, Mackinaw City, or Kewaunee	25	75
		Peoria	26	74
		St. Louis	28	72

SECTION V

1.	E-5 and W-1	Chicago, Peoria or St. Louis	15	85
2.	E-5 and W-2	Chicago, Peoria or St. Louis	15	85
3.	E-5 and W-3	Chicago, Peoria or St. Louis	17	83
4.	E-5 and W-4	Chicago, Peoria or St. Louis	19	81
5.	E-5 and W-5	Chicago, Peoria or St. Louis	21	79

[fol. 1235]

[fol. 1236]

Section VI

Notes

(a) The divisions prescribed in Section V shall not apply on shipments to or from points on the lines of eastern, southern, or western railroads in Group E-5 when such railroads perform service both east and west of the Mississippi River, but in lieu thereof the divisions prescribed in Appendix C-1 shall apply.

(b) The divisions prescribed for Groups W-4 and W-5 shall apply only over routes through northern gateways, viz., Duluth, Minneapolis, Minnesota Transfer, and St. Paul, Minn., and Superior, Wis.

(c) Nothing in this report and order shall be interpreted as prescribing divisions of rates to and from points on the Durham and Winston-Salem districts of the Norfolk and Western Railway Company.

(d) Nothing in this report and order shall be interpreted as prescribing divisions for terminal switching service at a point of origin or destination on traffic which is interchanged thereat between a complainant and a defendant.

(e) When intermediate switching service of the Terminal Railroad Association of St. Louis, the Alton and Southern Railroad, the Illinois Terminal Railway Company, or motor-carrier service is necessary to effect interchange at St. Louis or East St. Louis, the applicable charges for such service shall be payable from the eastern primary division on westbound shipments and from the western primary division on eastbound shipments.

[fol. 1237] Nothing in this report and order shall be interpreted as prescribing a division for service between East St. Louis and St. Louis on traffic which originates or terminates in the St. Louis-East St. Louis district and is interchanged therein between a complainant and a defendant.

(f) Nothing in this report and order shall be interpreted as having any effect on special arrangements between a complainant and a defendant relating to intermediate service required for interchange at points other than St. Louis-East St. Louis.

(g) Divisions of rates over cross-lake routes via Milwaukee and Manitowoc, Wis., and Menominee and Manistique, Mich., shall be the same as those prescribed via Kewaunee.

[fol. 1238] No. 31503

APPENDIX C-1

Intraterritorial Divisions and Interterritorial Subdivisions Prescribed

	Scales of Divisional Factors		
Miles	1	2	3
50	65		72
100	77		85
150	89		98
200	101	75	111
250	113	87	124
300	125	99	138
350	137	111	151
400	149	123	164
450	161	135	177
500	174	148	191
550	186	160	205
600	198	172	218
650	210	184	231
700	222	196	244
750	234	208	257
800	246	220	271
850	258	232	284
900	270	244	297
950	282	256	310
1000	294	268	323

Miles	1	2	3
1050	306	280	337
1100	318	292	350
1150	330	304	363
1200	342	316	376
[fol. 1239]			
1250	354	328	389
1300	367	341	404
1350	379	353	417
1400	391	365	430
1450	403		443
1500	415		457
1550	427		470
1600	439		483
1650	451		496
1700	463		509
1750	475		523
1800	487		536
1850	499		549
1900	511		562
1950	523		575
2000	535		589
2050	547		602
2100	559		615

Definitions

Mountain-Pacific territory includes the States of Arizona, California, Washington, Oregon, Idaho, Montana, Nevada, Utah, New Mexico (except that portion which is east of the line of the AT&SF between Raton, N. Mex. and El Paso, Texas), Colorado (except that portion which is east of the Colorado and Southern and paralleling railroads between Cheyenne, Wyo., and Trinidad, Colo.), and Wyoming (except that portion which is east of Gillette, Casper, and Cheyenne).

[fol. 1240] Midwestern territory includes all territory between mountain-Pacific territory and official or southern territory, and also points in Indiana in the Chicago switching district.

The "border" of any territory refers to the points through which a shipment moves. When a shipment moves over lines of railroad which constitute the border of mountain-Pacific territory, the point of interchange shall be considered the border point.

Prescribed Divisions

(a) Primary divisions of intraterritorial rates shall be percentages determined by use of the scales of prorating factors hereinabove set forth.

(b) The factor for the haul in mountain-Pacific territory shall be that shown in column 3 for the short-line distance between the point of origin or destination in transcontinental territory (including Montana) and the border between mountain-Pacific and midwestern territories. The factor for the haul in midwestern territory shall be that shown in column 1 for the short-line distance between the point of origin or destination in midwestern territory and the border between that territory and mountain-Pacific territory.

(c) When a shipment is interchanged between a complainant in Sub-Nos. 1, 2, and 3 and a defendant therein at a point within midwestern territory, the primary division for the haul in such territory determined as provided in paragraph (b) shall be subdivided as follows: The factor for the haul which includes origin or destination terminal service in midwestern territory shall be that shown [fol. 1241] in column 1 for the short-line distance between the point of origin or destination and the point of interchange, and the factor for the intermediate haul shall be that shown in column 2 for the short-line distance between the point of interchange and the border of mountain-Pacific territory.

(d) Subdivisions of western primary divisions of interterritorial rates between official and transcontinental territories prescribed in Appendix B-1 shall be determined

as follows: The factor for the haul in mountain-Pacific territory shall be that shown in column 3 for the short-line distance between the point of origin or destination in transcontinental territory (including Montana) and the border between mountain-Pacific territory and midwestern territory, and the factor for the haul in midwestern territory shall be that shown in column 2 for the short-line distance between the aforesaid border and the border of official territory. On an interterritorial shipment interchanged between a complainant in Sub-Nos. 1, 2, and 3 and a defendant therein at a point within midwestern territory the intermediate subdivision determined as provided in the next-preceding sentence shall be further subdivided by applying to the respective hauls the factors shown in column 2 for the short-line distances between the territorial borders and the point of interchange within midwestern territory.

(e) In no case shall a primary division be less than 15 percent, and in disposing of fractions of 1 percent the odd 1 percent should be added to the percentage which contains [fol. 1242] the larger decimal or, if the percentages contain equal decimals, 1 percent should be added to the odd-numbered percentage, *provided*, however, that if the parties so agree, percentages including decimal fractions may be established.

(f) The parties may, if they so agree, establish percentages other than those determined as herein provided for the purpose of grouping or of equalizing competing routes or gateways.

Notes

(a) The prescribed divisions shall not apply on traffic interchanged at Chicago by The Atchison, Topeka and Santa Fe Railway Company and the Chicago and North Western Railway Company subject to special divisions heretofore agreed upon by those companies.

(f) Nothing in this report and order shall be interpreted as having any effect on special arrangements between a complainant and a defendant relating to intermediate service required for interchange at points other than St. Louis-East St. Louis.

(g) Divisions of rates over cross-lake routes via Milwaukee and Manitowoc, Wis., and Menominee and Manistique, Mich., shall be the same as those prescribed via Kewaunee.

[fol. 1238] No. 31503

APPENDIX C-1

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Miles	Scales of Divisional Factors 1	2	3
50	65		72
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250	113	87	124
300	125	99	138
350	137	111	151
400	149	123	164
450	161	135	177
500	174	148	191
550	186	160	205
600	198	172	218
650	210	184	231
700	222	196	244
750	234	208	257
800	246	220	271
850	258	232	284
900	270	244	297
950	282	256	310
1000	294	268	323

Miles	1	2	3
1050	306	280	337
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1150	330	304	363
1200	342	316	376
[fol. 1239]			
1250	354	328	389
1300	367	341	404
1350	379	353	417
1400	391	365	430
1450	403		443
1500	415		457
1550	427		470
1600	439		483
1650	451		496
1700	463		509
1750	475		523
1800	487		536
1850	499		549
1900	511		562
1950	523		575
2000	535		589
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Definitions

Mountain-Pacific territory includes the States of Arizona, California, Washington, Oregon, Idaho, Montana, Nevada, Utah, New Mexico (except that portion which is east of the line of the AT&SF between Raton, N. Mex. and El Paso, Texas), Colorado (except that portion which is east of the Colorado and Southern and paralleling railroads between Cheyenne, Wyo., and Trinidad, Colo.), and Wyoming (except that portion which is east of Gillette, Casper, and Cheyenne).

[fol. 1240] Midwestern territory includes all territory between mountain-Pacific territory and official or southern territory, and also points in Indiana in the Chicago switching district.

The "border" of any territory refers to the points through which a shipment moves. When a shipment moves over lines of railroad which constitute the border of mountain-Pacific territory, the point of interchange shall be considered the border point.

Prescribed Divisions

(a) Primary divisions of intraterritorial rates shall be percentages determined by use of the scales of prorating factors hereinabove set forth.

(b) The factor for the haul in mountain-Pacific territory shall be that shown in column 3 for the short-line distance between the point of origin or destination in transcontinental territory (including Montana) and the border between mountain-Pacific and midwestern territories. The factor for the haul in midwestern territory shall be that shown in column 1 for the short-line distance between the point of origin or destination in midwestern territory and the border between that territory and mountain-Pacific territory.

(c) When a shipment is interchanged between a complainant in Sub-Nos. 1, 2, and 3 and a defendant therein at a point within midwestern territory, the primary division for the haul in such territory determined as provided in paragraph (b) shall be subdivided as follows: The factor for the haul which includes origin or destination terminal service in midwestern territory shall be that shown [fol. 1241] in column 1 for the short-line distance between the point of origin or destination and the point of interchange, and the factor for the intermediate haul shall be that shown in column 2 for the short-line distance between the point of interchange and the border of mountain-Pacific territory.

(d) Subdivisions of western primary divisions of interterritorial rates between official and transcontinental territories prescribed in Appendix B-1 shall be determined

as follows: The factor for the haul in mountain-Pacific territory shall be that shown in column 3 for the short-line distance between the point of origin or destination in transcontinental territory (including Montana) and the border between mountain-Pacific territory and midwestern territory, and the factor for the haul in midwestern territory shall be that shown in column 2 for the short-line distance between the aforesaid border and the border of official territory. On an interterritorial shipment interchanged between a complainant in Sub-Nos. 1, 2, and 3 and a defendant therein at a point within midwestern territory the intermediate subdivision determined as provided in the next-preceding sentence shall be further subdivided by applying to the respective hauls the factors shown in column 2 for the short-line distances between the territorial borders and the point of interchange within midwestern territory.

(e) In no case shall a primary division be less than 15 percent, and in disposing of fractions of 1 percent the odd 1 percent should be added to the percentage which contains [fol. 1242] the larger decimal or, if the percentages contain equal decimals, 1 percent should be added to the odd-numbered percentage, *provided*, however, that if the parties so agree, percentages including decimal fractions may be established.

(f) The parties may, if they so agree, establish percentages other than those determined as herein provided for the purpose of grouping or of equalizing competing routes or gateways.

Notes

(a) The prescribed divisions shall not apply on traffic interchanged at Chicago by The Atchison, Topeka and Santa Fe Railway Company and the Chicago and North Western Railway Company subject to special divisions heretofore agreed upon by those companies.

(b) The prescribed divisions shall not apply on traffic which is reconsigned or is subject to transit arrangements involving unusual out-of-line or back-haul service and is now subject to special divisions, referred to in Exhibit MW-140, Appendix E, as amended.

(c) The prescribed divisions shall not apply on traffic subject to joint rates in which The Texas and Pacific Railway Company (including its subsidiaries) and cross-complainants in No. 31503 (Sub-No. 1) solely participate.

(d) The prescribed divisions of rates to and from points in Montana shall apply only over routes via Duluth, Minneapolis, Minnesota Transfer, St. Paul, Minn., or Superior, Wis.

[fol. 1243] (e) The prescribed divisions shall not apply on traffic which originates or terminates at points in North Dakota or at points in Minnesota excluded from the definition of Midwestern Territory in Appendix D to the complaint in Sub-No. 1.

No. 31503
Appendix D

Comparison of Defendants' Costs, Restated Costs, and Rail Form A Costs
(Out-of-Pocket Level)

Item (1)	Official-Mountain Pacific Traffic: Official (2)	Midwest (3)	Mountain Pacific (4)	Total (5)	Midwest-Mountain Pacific Traffic: Midwest (6)	Mountain Pacific (7)	Total (8)
Defendants' Costs[1]	$3,619,872	$2,646,074	$8,916,391	$15,182,337	$2,929,720	$7,576,989	$10,506,709
Restatement - Six Adjustments							
Way and structures - running[2]	+ 112,190	+ 433,226	+ 370,687	+ 916,103	+ 368,607	+ 259,727	+ 628,334
Locomotive costs[2]	- 31,292	- 30,978	- 364,730	- 427,000	- 73,848	- 339,549	- 413,397
Car costs[2]	+ 137,963	- 18,887	- 5,819	+ 113,257	- 13,914	- 14,831	- 28,745
Solely related[3]	---	---	- 30,800	- 30,800	---	- 19,843	- 19,843
Freight car empty return[4]	+ 312,565	+ 159,670	- 112,633	+ 359,602	+ 183,139	+ 59,447	+ 242,586
Return on capital[4]	- 317,536	- 274,087	- 811,151	- 1,402,774	- 272,561	- 734,603	- 1,007,164
Six adjustments - net	+ 213,890	+ 268,944	- 954,446	- 471,612	+ 191,423	- 789,652	- 598,229
Restatement	$3,833,762	$2,915,018	$7,961,945	$14,710,725	$3,121,143	$6,787,337	$ 9,908,480
Defendants' Remaining Adjustments (net)[5]	+ 306,036	+ 153,732	+ 144,617	+ 604,385	+ 102,160	+ 142,100	+ 244,260
Rail Form A[6]	$4,065,965	$3,100,293	$8,052,875	$15,219,133	$3,208,419	$6,897,880	$10,106,299

Footnotes to Appendix D:

1 - Source: Transcontinental Ex. T-791 and Midwest Ex. MW-768.

2 - These three adjustments as shown by Midwestern lines' Exhibit MW-768.

3 - The solely related adjustment was computed on the basis of the percentages shown in Exhibit T-632. This gives consideration to the fact that the other adjustments include a portion of total solely related.

4 - These adjustments are based on Exhibit MW-773, changed from a cost territory (Code "X") basis to a revenue group (Code "Z") basis. The lapover of Mountain Pacific roads into Midwest territory was the difference between the Mountain Pacific service on the revenue group basis and on the cost territory basis. The lapover between Midwest and Official was computed by the same method. Lapover was associated with thru train service, computed to be 36.56739% of Midwest made by Mountain Pacific trains and 2.27311% of Official made by Midwest trains. Sources: MW-768, T-632, and Tr. 10,399.

5 - The adjustments as shown by Midwestern lines' Exhibit MW-768, other than adjustments on lines 2, 3, 4 and 5.

6 - Rail Form A costs are based on defendants' costs reflecting a corrected car-mile count in the Midwest and excluding special services as shown on Exhibit MW-768. If they were based on the Defendants' costs shown on Exhibit T-791 and corresponding costs on Exhibit MW-768, they would be line 1 above plus or minus lines 8 and 10, or for Official-Mountain Pacific traffic: Official $4,139,798, Midwest $3,068,750, Mountain Pacific $8,106,562, Total $15,315,110; and for Midwest-Mountain Pacific traffic: Midwest $3,223,303, Mountain Pacific $ 6,929,437, Total $10,152,740.

[fol. 1245]

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Washington, D. C.

ORDER—December 31, 1963

No. 31503

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY ET AL.,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

No. 31503 (Sub-No. 1)

AHNAPEE & WESTERN RAILWAY COMPANY ET AL.,

v.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL.

No. 31503 (Sub-No. 2)

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL.,

v.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL.

No. 31503 (Sub-No. 3)

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,

v.

SAME.

No. 31503 (Sub-No. 4)

LOUISVILLE & NASHVILLE RAILROAD COMPANY,

v.

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY ET AL.

No. 31503 (Sub-No. 5)

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY,

v.

SAME.

The Commission having on the data hereof made and filed its supplemental report containing its findings of fact and conclusions thereon, which said report and the report of March 21, 1963, are hereby referred to and made a part hereof:

[fol. 1246] It is ordered, That the petitions for reconsideration or modification of the report and order of March 21, 1963, and of the order of June 20, 1963, in the above-entitled proceedings, filed by the mountain-Pacific rail carriers, the midwestern complainants, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, the Wabash Railroad Company, the Missouri-Kansas-Texas Railroad

Company, the St. Louis-San Francisco Railway Company, and the interveners, California Public Utilities Commission and other mountain-Pacific State Commissions be, and they are hereby denied, except insofar as the said report and order are modified herein;

It is further ordered, That the petition of the Missouri-Kansas-Texas Railroad Company and the St. Louis-San Francisco Railway Company for leave to file a petition for further hearing be, and it is hereby granted, and that the petition for further hearing so tendered be, and it is hereby, denied;

It is further ordered, (1) That the complainants and the defendants in No. 31503 and No. 31503 (Sub-Nos. 1, 4, and 5), according as they participate in the transportation be, and they are hereby, notified and required to establish, on or before March 30, 1964, and thereafter to apply, divisions of joint all-rail interstate rates for the transportation of property between points in official or eastern territory on the one hand, and on the other, points in transcontinental territory (including Montana), determined as provided in Appendix B-1, and (2) that the complainants and the defendants in No. 31503 (Sub-Nos. 1, 2, and 3) [fol. 1247] according as they participate in the transportation be, and they are hereby, notified and required to establish, on or before March 30, 1964, and thereafter to apply divisions of joint all-rail interstate rates for the transportation of property between points in midwestern territory, on the one hand, and on the other, points in transcontinental territory (including Montana) and subdivisions of primary divisions of joint rates between official or eastern territory and transcontinental territory (including Montana) prescribed in the next preceding paragraph determined as provided in Appendix C-1, and (3) that the order of March 21, 1963, shall remain in full force and effect and shall expire upon compliance by the parties with (1) and (2) hereof.

It is further ordered, That the said complainants and defendants be, and they are hereby, notified and required to cease and desist, on or before March 30, 1964, and thereafter to abstain, from asking, demanding, collecting or receiving divisions (or subdivisions) of said joint rates upon bases other than those hereby prescribed;

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

Harold D. McCoy, Secretary.

(Seal)

[fol. 1248]

Service Date February 7, 1964

INTERSTATE COMMERCE COMMISSION

Washington 25, D. C.

February 4, 1964

No. 31503[1]

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY ET AL.,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

Notice to the Parties:

On January 22, 1964, copies of the Supplemental Report and Order of the Commission, filed and entered December 31, 1963, were served upon interested parties. Through inadvertence, certain errors were made on sheet 1, Appendix B-1 and sheet 9, Appendix C-1, which should be corrected as follows:

The description of group E-5 in Appendix B-1 (sheet 1 of appendices) is corrected to read as follows:

> E-5, points on southern, western or eastern railroads in Illinois south and east of the line of the Atchison, Topeka & Santa Fe between Chicago and Peoria and the line of the Gulf, Mobile & Ohio between Peoria

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[1] This notice embraces also No. 31503 (Sub-No. 1), Ahnapee & Western Railway Company et al. v. Abilene & Southern Railway Company et al.; No. 31503 (Sub-No. 2), Chicago, Burlington & Quincy Railroad Company et al. v. Abilene & Southern Railway Company et al.; No. 31503 (Sub-No. 3), Chicago, Milwaukee, St. Paul & Pacific Railroad Company v. Same; No. 31503 (Sub-No. 4), Louisville & Nashville Railroad Company v. Akron, Canton & Youngstown Railroad Company et al.; and No. 31503 (Sub-No. 5), Cincinnati, New Orleans & Texas Pacific Railway Company v. Same.

and East St. Louis, and also Evansville, Vincennes, and Terre Haute, Ind.

[fol. 1249] The first paragraph on sheet 9 of appendices (Appendix C-1) is corrected to read as follows:

Midwestern territory includes all territory between mountain-Pacific territory and official or southern territory and includes also points in Indiana in the Chicago switching district and stations on the line of the Elgin, Joliet and Eastern Railway Company in Indiana.

Harold D. McCoy, Secretary.

[fol. 1250]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, GREAT NORTHERN RAILWAY COMPANY, LOS ANGELES JUNCTION RAILWAY COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, SANTA MARIA VALLEY RAILWAY COMPANY, SOUTHERN PACIFIC COMPANY, TRONA RAILWAY COMPANY, UNION PACIFIC RAILROAD COMPANY, VENTURA COUNTY RAILWAY COMPANY, and THE WESTERN PACIFIC RAILROAD COMPANY, Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

COMPLAINT TO ENJOIN, SET ASIDE, ANNUL AND SUSPEND ORDER OF THE INTERSTATE COMMERCE COMMISSION—Filed June 25, 1963

[fol. 1251] Plaintiffs above named, by their attorneys, for statement of their claim against defendants respectfully allege:

I.

This is a proceeding to enjoin, set aside, annul and suspend an order entered by the Interstate Commerce Commission (hereinafter referred to as the "Commission") in administrative proceedings identified as I.C.C. Docket No. 31503, Akron, Canton & Youngstown Railroad Company, et al. v. Atchison, Topeka & Santa Fe Railway Com-

[File endorsement omitted]

pany; I.C.C. Docket No. 31503 (Sub No. 1), Ahnapee & Western Railway Company, et al. v. Abilene & Southern Railway Company, et al.; I.C.C. Docket No. 31503 (Sub No. 2), Chicago, Burlington & Quincy Railroad Company, et al. v. Abilene & Southern Railway Company, et al.; I.C.C. Docket No. 31503 (Sub No. 2), Chicago, Burlington & Quincy Railroad Company, et al. v. Abilene & Southern Railway Company, et al.; I.C.C. Docket No. 31503 (Sub No. 3), Chicago, Milwaukee, St. Paul & Pacific Railroad Company v. Abilene & Southern Railway Company, et al.; I.C.C. Docket No. 31503 (Sub No. 4), Louisville & Nashville Railroad Company v. Akron, Canton & Youngstown Railroad Company et al.; and I.C.C. Docket No. 31503 (Sub No. 5), Cincinnati, New Orleans & Texas Pacific Railway Company v. Akron, Canton & Youngstown Railroad Company, et al.

II.

Plaintiffs are common carriers engaged in the transportation of property and persons for hire and are subject to the Interstate Commerce Act (49 U.S.C. §1 *et seq.*) in respect of their interstate operations. Plaintiff The Atchison, Topeka and Santa Fe Railway Company is a corporation organized under the laws of the State of Kansas, having its [fol. 1252] principal office at Topeka, Kansas, and operating lines of railroad in eleven states, including lines in the Southern District of California. Plaintiff The Denver and Rio Grande Western Railroad Company is a corporation organized under the laws of the State of Delaware, having its principal office at Denver, Colorado, and operating lines of railroad in three states. Plaintiff Great Northern Railway Company is a corporation organized under the laws of the State of Minnesota, having its principal office at St. Paul, Minnesota, and operating lines of railroad in ten states, including California. Plaintiff Los Angeles Junction Railway Company is a corporation organized under the laws of the State of California, having its principal office at Los Angeles, California, and operating

lines of railroad in Southern District of California. Plaintiff Northern Pacific Railway Company is a corporation organized under the laws of the State of Wisconsin, having its principal office at St. Paul, Minnesota, and operating lines of railroad in seven states. Plaintiff Santa Maria Valley Railway Company is a corporation organized under the laws of the State of California, having its principal office at Santa Maria, California, and operating lines of railroad in the Southern District of California. Plaintiff Southern Pacific Company is a corporation organized under the laws of the State of Delaware having its principal office at San Francisco, California, and operating lines of railroad in eleven states, including lines in the Southern District of California. Plaintiff Trona Railway Company is a corporation organized under the laws of the State of California, having its principal office at Trona, California, and operating lines of railroad in the Southern District of California. Plaintiff Union Pacific Railroad Company is a [fol. 1253] corporation organized under the laws of the State of Utah, having its principal office at Omaha, Nebraska, and operating lines of railroad in eleven states, including lines in the Southern District of California. Plaintiff Ventura County Railway Company is a corporation organized under the laws of the State of California, having its principal office at Oxnard, California, and operating lines of railroad in the Southern District of California. Plaintiff The Western Pacific Railroad Company is a corporation organized under the laws of the State of California, having its principal office at San Francisco, California, and operating lines of railroad in three states, including California.

III.

The United States of America is made defendant in this proceeding pursuant to Title 28, United States Code, Section 2322. Defendant Interstate Commerce Commission is an agency of the United States created pursuant to the Interstate Commerce Act (49 U.S.C. §1 *et seq.*).

IV.

The jurisdiction of this Court is invoked under Title 28, United States Code, Sections 1336, 2284 and 2321 through 2325, inclusive. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

V.

The venue of this proceeding is in this Court pursuant to Title 28, United States Code, Section 1398.

[fol. 1254]

VI.

The underlying controversy out of which this proceeding arises is a dispute as to the lawful and proper division of the revenues produced by freight traffic moving over transcontinental routes—that is, traffic moving between most of the stations on the lines of plaintiffs located in Mountain-Pacific territory and stations on the lines of other railroads operating in Midwestern territory and in Official territory. Mountain-Pacific territory includes Montana and all territory in the Rocky Mountains and west. Official territory (also referred to as Eastern territory), is generally east of the Mississippi River and north of the Ohio River. Midwestern territory lies generally west of the Mississippi River and east of the Rocky Mountains and Montana.

VII.

The movements of freight traffic involved in this case require the participation of railroads in more than one territory. On movements between Mountain-Pacific territory and Official territory, the participation of railroads in all three territories is required. On movements between Mountain-Pacific territory and Midwestern territory, the traffic involved requires the participation of one or more of the Mountain-Pacific lines and one or more of the Midwestern lines. Pursuant to the mandate of Section 1(4) of the Interstate Commerce Act (49 U.S.C. §1(4)), a num-

ber of "reasonable rates, fares, charges and classifications applicable thereto" have been established between the participating railroads with respect to this transcontinental traffic.

[fol. 1255] VIII.

Section 1(4) of the Act also requires that the carriers establish "just, reasonable and equitable divisions" of the joint rates applicable to these movements. Pursuant to this statutory obligation, the plaintiffs, together with the railroads serving Midwestern territory and the railroads serving Official territory, have in the past agreed upon the bases of dividing practically all of the revenues produced by the transcontinental traffic. These agreed bases of divisions have been in effect for a number of years and, as of the date of this Complaint, are the bases being applied in dividing the revenues produced by that traffic.

IX.

On April 5, 1954, most of the railroads operating in Official territory filed a Complaint before the Interstate Commerce Commission, docketed as No. 31503, asking the Commission to declare unlawful the existing divisions of revenues on all freight traffic moving between stations on the complainant lines in Official territory and stations in Mountain-Pacific territory. The Eastern lines' complaint before the Commission named as defendants all railroads "engaged jointly with complainants in the transportation of property in railroad freight service under joint rates between the points described above" (including plaintiffs herein), and requested that the Commission exercise its power under Section 15(6) of the Interstate Commerce Act to prescribe "just, reasonable and equitable" divisions of these rates. On June 3, 1954, the Midwestern lines filed a separate complaint, docketed as No. 31503 (Sub No. 1), asking the Commission to declare unlawful both their [fol. 1256] present divisions as intermediate carriers on

most of the traffic covered by the Eastern lines' complaint and divisions on traffic moving between most of Mountain-Pacific territory and the Midwest. The Midwestern lines' complaint also named as defendants all the railroads that participate with them in the movements brought into issue (again including the plaintiffs herein), and requested the prescription of "just, reasonable and equitable" divisions. Additional complaints, filed by other Eastern and Midwestern lines, were docketed as Sub Nos. 2, 3, 4 and 5 of No. 31503. Answers and cross-complaints were filed by the plaintiffs herein to each of these complaints.

X.

The state regulatory commissions of California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah and Washington sought and obtained permission to participate in the proceedings on these complaints as representatives of the interest of the public in their respective States.

XI.

On March 21, 1963, after the issuance of a report by its Examiners and the filing of Exceptions to the Examiners' report and Replies to Exceptions, the Commission made its report entered its order in the Docket No. 31503 proceedings, said report and order being served upon the parties on March 28, 1963. In its report attached to this Complaint and marked Exhibit A and made a part hereof, the Commission made the ultimate findings: (1) that the present divisions of revenues derived from the transportation of property over transcontinental routes "are unjust, unreasonable and inequitable" both as between the Mountain-[fol. 1257] Pacific lines and the Eastern lines, and as between the Mountain-Pacific lines and the Midwestern lines; and, (2) that "just, reasonable and equitable divisions" between the Mountain-Pacific lines and the Eastern lines "would be those set forth in Appendix B hereto" and between the Mountain-Pacific lines and the Midwestern lines

"would be those set forth in Appendix C hereto." The Commission found that its order would produce increases in the divisions of the Eastern lines ranging from 24 per cent to 45 per cent on representative shipments, and stated that its order would also "produce moderate increases in some of the most important midwestern divisions." But the Commission did not find, and the record does not show, the effect of the order upon the revenues of plaintiffs or any other carriers or groups of carriers.

XII.

In the order of the Interstate Commerce Commission dated March 21, 1963, attached hereto and marked Exhibit B and made a part hereof, the Commission ordered that plaintiffs be required to establish on or before July 1, 1963, and thereafter apply, the divisions provided in said Appendices B and C to its report.

XIII.

On April 4, 1963, plaintiffs filed with the Commission a timely request for extension of the period for filing petitions for reargument and reconsideration and for further hearing as allowed by the Commission's General Rules of Practice. By order of April 12, 1963, which order is attached hereto and marked Exhibit C, this request was granted and the time for filing such petitions was extended [fol. 1258] to July 26, 1963, and the due date for replies was set at September 11, 1963. Thereafter, on April 26, 1963, plaintiffs filed a petition for modification of the effective date of the March 21, 1963, order asking that the originally specified July 1, 1963, effective date be postponed pending disposition of petitions for reargument and reconsideration and for further hearing that might be filed on July 26, 1963. By order of June 24, 1963, a transcribed copy of which is attached hereto and marked Exhibit D, the Commission denied plaintiffs' petition for modification of effective date. Accordingly, the new bases of divisions

prescribed in the Commisison's order of March 21, 1963, will become effective on July 1, 1963, unless restrained or enjoined by this Court.

XIV.

The Commission's action in refusing to postpone the effective date of its March 21, 1963, order pending disposition of the petitions for reargument and reconsideration and for further hearing to be filed on July 26, 1963, has rendered such further proceedings inadequate to protect plaintiffs against irreparable injury from that order. Plaintiffs have exhausted their administrative remedies, and this action is brought to obtain judicial review of, and judicial relief from the Commission's order of March 21, 1963.

XV.

The Commission's order dated March 21, 1963 to make effective on and after July 1, 1963, new bases of divisions on transcontinental traffic is unlawful and in violation of the Interstate Commerce Act (49 U.S.C. § 1 *et seq.*), the Administrative Procedure Act (5 U.S.C. § 1001 *et seq.*), [fol. 1259] and the Due Process Clause of the Federal Constitution (Amend. V).

(1) The Commission has failed to make findings essential to the determination of issues under Section 15(6) of the Interstate Commerce Act.

(2) The Commission's order is unlawful because it drastically reduces the divisional revenues of plaintiffs without making any finding with respect to the amount of annual revenues which the order would transfer from plaintiffs to the Eastern and Midwestern carriers, without containing any finding that such a transfer is necessary to meet any specified proportion of the revenue needs of the carriers that would receive the increased divisions, and without any finding that

such a transfer will not unduly impair plaintiffs' ability to meet their needs for revenues.

(3) The Commission's order rests upon an unlawful basis.

(4) The Commission's order rests on the concept that a change in divisions on the ground of revenue needs can be based upon differences in earnings "as freight carriers," a theory which is unlawful under Section 15(6) of the Interstate Commerce Act, which is not supported by rational findings and which denied plaintiffs a fair hearing by denying them any opportunity to offer evidence in explanation or rebuttal of the unreal statistical data relied upon.

[fol. 1260] (5) The Commission's order is not supported by adequate or substantial evidence.

(6) The Commission has prescribed entirely new bases of divisions of transcontinental rates without any findings or explanation of the percentage divisions prescribed in Appendix B of its report or of the scales prescribed in Appendix C of its report; the sole instance as to which the Commission has given a reason for the percentage prescribed relates to the use of a 15 per cent minimum and the reason given is not supported by substantial evidence and is contrary to the evidence.

(7) The order is unsupported by evidence typical in character and ample in quantity to justify each of the divisions prescribed.

(8) The Commission failed to make findings of fact on material issues as to which competent evidence was adduced.

(9) The Commission failed to recognize or give effect to the evidence showing the relative burdens borne by plaintiffs in handling transcontinental traffic

over a series of mountain ranges in contrast to the service performed by the Midwestern and Eastern lines in handling the same traffic over level or relatively level terrain.

(10) The Commission erred in imposing upon plaintiffs the burden of proving the costs incurred by the [fol. 1261] Midwestern and Eastern lines who are complainants before the Commission and who are in possession of all the facts as to the cost of handling the traffic at issue over their own lines.

(11) The Commission's "criticisms" of plaintiffs' cost evidence are not supported by adequate findings or by substantial evidence, are contrary to the evidence and, even if they were valid criticisms, would not justify substitution of territorial average costs for the costs actually incurred in handling transcontinental traffic.

(12) The Commission erred in failing to reconsider its report and order prior to the effective date thereof.

XVI.

The March 21, 1963 order of the Commission was a result of proceedings in which plaintiffs were deprived of the full and fair hearing to which they were entitled by virtue of the Interstate Commerce Act, the Administrative Procedure Act and the Due Process Clause of the Fifth Amendment of the Federal Constitution.

XVII.

The Commission had before it and relied upon estimates outside the record as to the amount of revenue the prescribed divisions would shift from the Mountain-Pacific lines to the Eastern and Midwestern lines and failed to disclose the nature of those estimates or the source from which they were derived.

[fol. 1262]

XVIII.

The Commission had before it, relied upon, and made findings with respect to an alleged "Restatement" of the relative costs incurred by the various groups of carriers in handling transcontinental traffic, notwithstanding the fact that such "Restatement" cannot be calculated from the record in this case, and the report failed to disclose the nature of the facts outside the record upon which that Restatement was based or the source from which those facts were taken.

XIX.

The Commission was furnished factual data and advice by its Cost Finding Section and other officers, employees and agents engaged in the performance of investigative or prosecuting functions relating to the rates or divisions of rates for the transcontinental traffic at issue in these proceedings and no such data or advices have ever been made available to plaintiffs.

XX.

The Commission threatens to enforce its order dated March 21, 1963 requiring that new bases of divisions be applied on and after July 1, 1963, and the said order will, if enforced, cause immediate and irreparable injury to plaintiffs. As specific grounds for the issuance of a temporary restraining order, for the issuance of an interlocutory injunction pending final disposition of this proceeding and for the granting of a permanent injunction in this proceeding, plaintiffs allege, in addition to the facts heretofore set forth, the following:

(1) If plaintiffs refuse to comply with the said order, such refusal will constitute a violation of [fol. 1263] Section 16(8) of the Interstate Commerce Act and such refusal may subject plaintiffs to statutory penalties of $5,000 for each offense, each day of

such refusal being deemed a separate offense, and such refusal will expose plaintiffs to an action by the United States for the recovery of such penalties;

(2) If plaintiffs are required to comply with said order, they will suffer an immediate and substantial loss of revenues which they now receive as their share of the revenues from transcontinental traffic. Plaintiffs are without any plain or adequate remedy at law as a multiplicity of actions would be required to recover divisions under present agreements with the Midwestern and Eastern lines. Plaintiffs are without any administrative remedy inasmuch as substantially none of the transcontinental rates were "established pursuant to a finding and order of the Commission" within the meaning of Section 15(6) of the Interstate Commerce Act and are thus not subject to the Commission's power to require retroactive adjustment of divisions.

(3) If plaintiffs are required to comply with said order, they would be required to make a double changeover in their elaborate accounting systems and duplicate accounting necessitated thereby: first, by being required to change the method of dividing transcontinental revenues to the bases prescribed by said order; and, second, by changing back to the present basis of divisions if the said order is permanently enjoined as [fol. 1264] prayed in this proceeding. Each change in accounting methods requires a reorganization of accounting procedures and a retraining of forces by each plaintiff, thus causing a substantial disruption in their normal operations, unnecessary delay on special projects that require the talents of these employees, and the needless expenditure of large sums of money.

(4) If the Commission's order dated March 21, 1963, is made effective, substantial changes in the present routing of transcontinental traffic would be caused by

the disproportionate and varying increases ordered for midwestern and eastern divisions over competitive routes. These changes would drastically alter the physical movement of traffic over the transcontinental routes to the irreparable injury of individual plaintiffs.

(5) No injury will be sustained by defendants or by the public through the issuance of a temporary restraining order and an interlocutory injunction pending final disposition of this proceeding.

Wherefore, plaintiffs pray:

1. That a temporary restraining order issue restraining the operation, enforcement or execution of the order of the Commission dated March 21, 1963, pending the hearing upon the issuance of the interlocutory injunction sought herein.

[fol. 1265] 2. That process may issue against defendants the United States of America and the Interstate Commerce Commission.

3. That a court constituted as required by Title 28 of the United States Code, Sections 2284 and 2321-2325, consisting of three judges, be convened.

4. That the operation, enforcement and execution of the order of March 21, 1963, be enjoined pending the final hearing and determination of this action.

5. That the operation, enforcement and execution of the order of March 21, 1963, be perpetually enjoined and permanently set aside, annulled and suspended.

6. That plaintiffs recover their proper costs.

7. That plaintiffs have such other and further relief in the premises as in equity may be deemed meet and just by this Honorable Court.

O'Melveny & Myers, Homer I. Mitchell, Warren M. Christopher; Sidley, Austin, Burgess & Smith, Douglas F. Smith, Howard J. Trienens, George L. Saunders, Jr., By Homer I. Mitchell, Attorneys for Plaintiffs.

Of Counsel:

S. R. Brittingham, Jr., Frank S. Farrell, Lawrence W. Hobbs, Thormund A. Miller, Ernest Porter, Howard V. Rhedin, Howard E. Roos, L. E. Torinus, Jr., E. L. Van Dellen.

[fol. 1266] *Duly sworn to by A. J. Stilling, jurat omitted in printing.*

[fol. 1267]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

APPLICATION FOR INTERLOCUTORY INJUNCTION AND TEMPORARY RESTRAINING ORDER—Filed June 26, 1963

1. Under date of March 21, 1963, the Interstate Commerce Commission entered an order prescribing radical changes in the present divisions of transcontinental railroad freight rates effective July 1, 1963. The order would increase the revenues of Eastern railroads and of most Midwestern railroads, while drastically reducing the revenues of the plaintiff railroads serving the far Western states (Mountain-Pacific territory).

[fol. 1268] 2. The amount of revenues transferred by the Commission is not stated in its report, but one Commis-

[File endorsement omitted]

sioner stated that "estimates indicate the figure would exceed $50 million annually."

3. In view of the many serious errors in the report of the Commission, and the magnitude and importance of the issues, plaintiffs requested an extension of time within which to file a petition for reconsideration of the Commission's action. Under date of April 12, 1963, the Commission extended to July 26, 1963, the time for filing petitions for reconsideration. Plaintiffs will file, on or before July 26, 1963, a petition for reconsideration of the Commission's said order.

4. On April 26, 1963, plaintiffs filed a formal Petition for Modification of Effective Date, requesting that the effective date of the Commission's order be postponed until disposition of petitions for reconsideration. In support of that petition, plaintiffs showed the consistent administrative practice of the Commission in such cases of postponing the effective date of the orders until petitions for reconsideration had been disposed of. The Eastern lines opposed any extension of the effective date. The Midwestern roads did not oppose the extension of the effective date, and two of the Midwestern roads affirmatively supported plaintiffs' petition.

5. By its order dated June 24, 1963, the Commission denied the Petition for Modification of Effective Date, [fol. 1269] and said order of the Commission dated March 21, 1963, will become effective on July 1, 1963, unless this Application for Interlocutory Injunction and Temporary Restraining Order is granted by this Court.

6. As shown by plaintiffs' verified complaint and by the affidavits of A. J. Stilling, R. K. Bradford, J. R. Houston, C. A. Allen and L. L. Rosenthal, plaintiffs will suffer irreparable injury in the form of uneconomic routings of traffic and costly disruptions of plaintiffs' accounting forces, unless the interlocutory injunction and temporary restraining order herein prayed for are granted.

7. A temporary restraining order is required to maintain the *status quo* pending hearing of plaintiffs' Application for an Interlocutory Injunction since under statutory requirements for a hearing by a three-judge court, said hearing cannot be held prior to July 1, 1963, when the Commission's order of March 21, 1963, becomes effective.

8. Under the Railway Accounting Rules, which govern the settlement of all interline accounts affected by the Commission's order, no payments will be made with respect to shipments moving on and after July 1, 1963, until August 20, 1963. The sole immediate significance of the July 1, 1963, effective date of the Commission's order is its requirement that plaintiffs "establish" the newly prescribed divisions on shipments moving on and after that [fol. 1270] date. This requirement would compel plaintiffs, under threat of penalties provided by the Interstate Commerce Act for violation of Commission orders, to make the drastic changes in their accounting procedures as of July 1, 1963. A temporary restraining order staying the Commission's order pending determination by the full statutory court of plaintiffs' Application for an Interlocutory Injunction will protect plaintiffs against a technical violation of the Commission's order without in any way affecting the ultimate financial obligations imposed by that order or even the date on which those obligations will be satisfied.

Wherefore, plaintiffs pray:

(1) That an Interlocutory Injunction be granted by a statutory three-judge court appointed pursuant to the provisions of 28 United States Code Section 2284 enjoining defendant United States of America and its agency, the Interstate Commerce Commission, from enforcing or attempting to enforce the order of the Interstate Commerce Commission dated March 21, 1963, in the proceedings before the Commission in Docket No. 31503 and Sub Nos., as more fully described in the verified complaint,

which order would become effective by its terms on July 1, 1963, until 30 days after the Commission's disposition of all petitions for reconsideration before the Interstate Commerce Commission in said proceedings and until further order of this Court;

(2) That a Temporary Restraining Order be granted by a judge of the above entitled court restraining defendant [fol. 1271] United States of America and its agency, the Interstate Commerce Commission, from enforcing or attempting to enforce said order of the Interstate Commerce Commission dated March 21, 1963, pending a hearing and determination by said three-judge court of plaintiffs' application for said Interlocutory Injunction.

Dated: June 25, 1963.

O'Melveny & Myers, Homer I. Mitchell, Warren M. Christopher; Sidley, Austin, Burgess & Smith, Douglas F. Smith, Howard J. Trienens, George L. Saunders, Jr., By Homer I. Mitchell, Attorneys for Plaintiffs.

[fol. 1272] Affidavit of Service (omitted in printing).

[fol. 1273]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

COMPLAINT OF ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, INTERVENING PLAINTIFF, TO ENJOIN, SET ASIDE, ANNUL AND SUSPEND ORDER OF THE INTERSTATE COMMERCE COMMISSION—Filed June 26, 1963

Comes now St. Louis-San Francisco Railway Company, intervening plaintiff in the above entitled cause, and for statement of its claim against defendants alleges:

I

Intervening plaintiff adopts by reference the matters alleged in paragraph I of the complaint filed by plaintiffs in this cause.

II

Intervening plaintiff St. Louis-San Francisco Railway Company is a common carrier by railroad, engaged in the transportation of property and persons for hire and is subject to the Interstate Commerce Act (49 USC § 1 et seq.) in respect of its interstate operations. St. Louis-San Francisco Railway Company is a corporation organized under the laws of the State of Missouri, having its princi-
[fol. 1274] pal office in St. Louis, Missouri and operating lines of railroad in the States of Florida, Alabama, Mississippi, Tennessee, Arkansas, Missouri, Kansas and Oklahoma.

[File endorsement omitted]

III

Intervening plaintiff adopts by reference paragraphs III, IV, V, VI, VII and VIII of the complaint filed by plaintiffs in this cause.

IV

Intervening plaintiff adopts by reference paragraph IX of the complaint of plaintiffs filed in this cause but states in addition thereto that intervening plaintiff was one of the "midwestern lines" which filed a separate complaint docketed by the Interstate Commerce Commission as No. 31503 (Sub. No. 1) referred to in said paragraph IX.

V

Intervening plaintiff adopts by reference paragraphs X, XI and XII of the complaint filed by plaintiffs in this cause, including the exhibits referred to in said paragraphs.

VI

Intervening plaintiff adopts the allegations of paragraph XIII of the complaint filed by plaintiffs in this cause with respect to dates upon which said plaintiffs filed requests with the Commission for the extension of the period for filing petitions for reargument and reconsideration by the Interstate Commerce Commission of its order dated March 21, 1963, and further alleges that on May 16, 1963 intervening plaintiff, in replying to the petition for modification of effective date filed with the Interstate Commerce Commission on April 26, 1963, indicated that it desired to join in seeking the postponement of the effective date of the order of the Interstate Commerce Commission dated March 21, 1963. By the order of the Interstate Commerce Commission dated June 24, 1963, a copy of which is attached to the complaint in this cause as Exhibit D, the [fol. 1275] Interstate Commerce Commission denied the petition of intervening plaintiff for postponement of the effective date of the order of the Interstate Commerce Commission dated March 21, 1963.

VII

Intervening plaintiff adopts by reference paragraph XIV of the complaint filed by plaintiffs in this cause.

VIII

The Order of the Interstate Commerce Commission dated March 21, 1963 to make effective on and after July 1, 1963, new bases of divisions on transcontinental traffic is, as it applies to the intervening plaintiff, unlawful and in violation of the Interstate Commerce Act (49 U.S.C. § 1 *et seq.*), the Administrative Procedure Act (5 U.S.C. § 1001 *et seq.*), and the Due Process Clause of the Federal Constitution (Amend. V) for the following reasons:

(1) The Commission's Order as it applies to intervening plaintiff is not supported by adequate or substantial evidence and is contrary to the evidence.

(2) The Commission's Order is unlawful because it drastically reduces the divisional revenues of intervening plaintiff without making any finding with respect to the amount of annual revenues of the intervening plaintiff which the Order would transfer from intervening plaintiff to other carriers without containing any finding that such a transfer is necessary to meet any specified proportion of the revenue needs of the carriers that would receive the increased divisions, and without any finding that such a transfer will not unduly impair intervening plaintiff's ability to meet their needs for revenues.

(3) The action of the Commission in failing to postpone the effective date of its Order until after all proceedings before it were completed is arbitrary and capricious and constitutes a failure by the Commission to accord intervening plaintiff the full hearing to which it is entitled under the Interstate Commerce Act, the Administrative Pro- [fol. 1276] cedure Act and the Due Process Clause of the Fifth Amendment of the Federal Constitution.

IX

The Commission threatens to enforce its Order dated March 21, 1963 requiring that new bases of divisions be applied on and after July 1, 1963, and the said order will, if enforced, cause immediate and irreparable injury to intervening plaintiff. As specific grounds for the issuance of a temporary restraining order, for the issuance of an interlocutory injunction pending final disposition of this cause, intervening plaintiff alleges, in addition to the facts heretofore set forth, that:

(1) If intervening plaintiff refuses to comply with said Order, such refusal will constitute a violation of Section 16(8) of the Interstate Commerce Act and such refusal may subject intervening plaintiff to statutory penalties of $5,000 for each offense, each day of such refusal being deemed a separate offense, and such refusal will expose plaintiff to an action by the United States for the recovery of such penalties;

(2) If intervening plaintiff is required to comply with said Order, it will suffer immediate and substantial loss of revenues which it now receives as its share of the revenues from transcontinental traffic;

(3) Intervening plaintiff is without any administrative remedy inasmuch as few of the transcontinental shipments move on rates which were "established pursuant to a finding and Order of the Commission" within the meaning of Section 15(6) of the Interstate Commerce Act and are thus not subject to the Commission's power to require retroactive adjustment of divisions;

(4) Intervening plaintiff alleges that by reason of all of the foregoing it is without any plain or adequate remedy at law as a multiplicity of actions would be required to recover divisions under present agreements

[fol. 1277] with the transcontinental and Eastern Carriers;

(5) If intervening plaintiff is required to comply with said Order, it would be required to make a double changeover in its accounting system and duplicate accounting would be necessitated thereby; first by being required to change the method of dividing transcontinental revenues to the bases prescribed by said Order; and, second, by changing back to the present basis of divisions if said Order is permanently enjoined as prayed in this cause. Each change in accounting methods requires a reorganization af accounting procedures, thus causing a substantial disruption in intervening plaintiff's normal accounting operations and the needless expenditure of large sums of money;

(6) No injury will be sustained by defendants or by the public through the issuance of a temporary restraining order and an interlocutory injunction pending final disposition of this proceeding.

Wherefore, intervening plaintiff prays:

1, That a temporary restraining order issue restraining the operation, enforcement or execution of the Order of the Commission dated March 21, 1963, pending the hearing upon the issuance of the interlocutory injunction sought herein.

2. That the operation, enforcement and execution of the Order of March 21, 1963, be enjoined pending the final hearing and determination of this action.

3. That upon full hearing, the operation, enforcement and execution of the Order of March 21, 1963 be perpetually enjoined and permanently set aside, annulled and suspended.

4. That intervening plaintiff have such other and further relief in the premises as in equity may be deemed meet and [fol. 1278] just and proper.

Ernest D. Grinnell, Jr., William F. Spalding, Gibson, Dunn & Crutcher, By William F. Spalding, Attorneys for Intervening Plaintiff.

[fol. 1279] *Duly sworn to by S. F. Stecher, jurat omitted in printing.*

[fol. 1280]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil No. 63-745-EC

[Title omitted]

MOTION OF ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY FOR LEAVE TO INTERVENE AND ORDER ALLOWING—Filed July 1, 1963

Comes now St. Louis-San Francisco Railway Company and moves the court for leave to intervene in the above entitled cause pursuant to the provisions of Section 2323 (Title 28) of the United States Code, and as grounds for said motion shows the court:

I

This action is brought by plaintiffs to attack an order of the Interstate Commerce Commission in its Docket No. 31503 and related cases dated March 21, 1963.

II

St. Louis-San Francisco Railway Company was a party to the proceedings before the Interstate Commerce Com-

[File endorsement omitted]

mission which resulted in the order under attack in this cause.

[fol. 1281] III

Said Section 2323 of Title 28 permits intervention by any party to the proceeding before the Commission "as of right."

IV

St. Louis-San Francisco Railway Company desires to intervene as a plaintiff in opposition to the order of the Interstate Commerce Commission.

V

The complaint of St. Louis San Francisco Railway Company as an intervening plaintiff is filed herewith.

Wherefore, St. Louis-San Francisco Railway Company prays the court to permit it to intervene as a party in this cause.

Respectfully submitted,

Ernest D. Grinnell, Jr., William F. Spalding, Gibson, Dunn & Crutcher, By William F. Spalding, Attorneys for Intervenor.

So Ordered:

6/27/1963.

Crary, Judge, United States District Court.

[fol. 1282]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

MOTION OF ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, INTERVENING PLAINTIFF, FOR A TEMPORARY RESTRAINING ORDER—Filed June 26, 1963

Comes now St. Louis-San Francisco Railway Company, intervening plaintiff in the above entitled cause, and moves the court to grant a temporary restraining order as prayed for in the verified complaint of this intervening plaintiff and as grounds for said motion shows the court:

(1) Intervening plaintiff attaches hereto the affidavit of Stanley F. Stecher, its Freight Traffic Manager.

(2) Unless the court grants a temporary restraining order in this cause, intervening plaintiff will suffer irreparable harm, as alleged in its complaint and as shown in the attached affidavit.

Wherefore, intervening plaintiff prays the court to grant a temporary restraining order, restraining defendant The United States of America and its agency, the Interstate [fol. 1283] Commerce Commission, from enforcing or attempting to enforce the order of the Interstate Commerce Commission dated March 21, 1963, in its Docket No. 31503 and related cases pending a hearing and determination by a three-judge court of intervening plaintiff's application for an interlocutory injunction.

Ernest D. Grinnell, Jr., William F. Spalding, Gibson, Dunn & Crutcher, By William F. Spalding.

[File endorsement omitted]

[fol. 1284]

AFFIDAVIT OF STANLEY F. STECHER, FREIGHT TRAFFIC MANAGER ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY IN SUPPORT OF THE MOTION FOR TEMPORARY RESTRAINING ORDER.

State of California,
County of Los Angeles, ss.:

My name is Stanley F. Stecher. I am Freight Traffic Manager, St. Louis-San Francisco Railway Company (Frisco), 906 Olive Street, St. Louis 1, Missouri. I have been employed by said company for 40 years, all of which time has been spent in the Freight Traffic Department. During said period my duties have included, among other things, the handling of divisions of revenue of traffic handled by Frisco, including the divisions of revenue on traffic moving to and from transcontinental territory. At present my duties include supervision of the officers and clerical force handling the divisions of revenue including the divi-

[fol. 1285] sion of revenues on transcontinental traffic.

Frisco is a Missouri corporation operating as a common carrier by railroad in the States of Florida, Alabama, Mississippi, Tennessee, Missouri, Arkansas, Kansas and Oklahoma. During the year 1961, Frisco and its wholly owned railroad subsidiaries had gross freight revenue of approximately $114,500,000.

I am generally familiar with the proceedings before the Interstate Commerce Commission in its docket No. 31503 and related cases, and I am generally familiar with the provisions of the Commission's Order dated March 21, 1963, in said proceedings.

To determine the immediate effect of said Order upon the Frisco and its railroad subsidiaries, there was prepared under my general supervision a study designed to show the amount and revenues now accruing to Frisco on the basis of existing divisions of revenue on transcontinental traffic as compared with the revenues on the same traffic which would accrue to Frisco under the divisions prescribed by the Commission's Order of March 21, 1963.

In making this comparison, a representative sample of 1406 cars out of a total of 3710 carload shipments moving during the month of October, 1961, to and from transcontinental territory on which the Frisco performed origin, intermediate, or destination service, was studied. October 1961 was selected because figures in the record before the Interstate Commerce Commission were based upon traffic moving in the year 1953. Since Frisco's pattern of traffic has changed during the intervening ten years, it was felt that traffic moving during a more recent period would provide a more accurate determination of the immediate effect of the Commission's Order. In October 1961, Frisco earned 9.33% of its total 1961 freight revenue.

The difference developed on October 1961 shipments was raised so as to represent revenue on an annual basis. On an annual basis it is estimated that Frisco's loss of revenue would be in excess of $420,000. This represents ap- [fol. 1286] proximately 9% of the net income of Frisco and its railroad subsidiaries during the year 1961.

In my opinion, the loss of this much revenue by Frisco would have a detrimental effect upon its ability to provide adequate rail service to the territory it serves.

If it is necessary for Frisco, in compliance with the Commission's Order of March 21, 1963, to change the basis upon which revenue on transcontinental traffic is divided during the pendency of the proceedings before the Interstate Commerce Commission and during the pendency of this cause, it would be necessary for us to account for said revenues upon a duplicate basis to provide for the possibility that the Commission's Order would be changed by it on reconsideration or enjoined by this Court with a resulting increase in the expense of accounting.

Stanley F. Stecher.

Subscribed and sworn to before me this 26th day of June, 1963.

Margaret M. Knighton, Notary Public in and for said County and State.

My Commission expires June 15, 1966.

[fol. 1287]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

TEMPORARY RESTRAINING ORDER—June 27, 1963

This cause came on to be heard on plaintiffs' motion for a Temporary Restraining Order pending the hearing of plaintiffs' application for the granting of an Interlocutory Injunction by a three-judge court to be convened pursuant to Section 2284 of Title 28 of the United States Code. This Court specifically finds, based upon plaintiffs' verified complaint and the affidavits of A. J. Stilling, R. K. Bradford, J. R. Houston, C. A. Allen and L. L. Rosenthal that defen-
[fol. 1288] dants are threatening to enforce the order of the Interstate Commerce Commission dated March 21, 1963, as of its effective date of July 1, 1963, notwithstanding the Commission's action in setting July 26, 1963, as the date for filing petitions for reconsideration and will continue to do so unless restrained by order of this Court, and that if a Temporary Restraining Order is not granted immediate and irreparable damage will result in the form of uneconomic reroutings of transcontinental railroad traffic and costly disruptions of plaintiffs' accounting staffs.

Now, Therefore, It Is Hereby Ordered that pending the hearing and determination of plaintiffs' application for the granting of an Interlocutory Injunction by a three-judge statutory court, the United States of America and its agency, the Interstate Commerce Commission, are re-

[File endorsement omitted]

strained from enforcing or attempting to enforce the order of the Commission dated March 21, 1963, in the proceedings before the Commission in its Docket No. 31503 and Sub Nos., as more fully described in plaintiffs' verified complaint, which order would become effective by its terms on July 1, 1963.

Nothing in this Temporary Restraining Order shall preclude the three-judge statutory court, in granting or denying plaintiffs' Application for an Interlocutory Injunction, from specifying terms and conditions to be applicable to the division of rates on transcontinental freight shipments effective on and after July 1, 1963.

[fol. 1289] This Temporary Restraining Order is on condition that a bond be filed by plaintiffs herein in the sum of $50,000 as security for the payment of such costs and damages as may be incurred or suffered by any party.

Dated this 27th day of June, 1963.

E. Avery Crary, United States District Judge.

[fol. 1290]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

ORDER SETTING TIME FOR HEARING MOTION FOR INTERLOCUTORY INJUNCTION, FILING OF AFFIDAVITS AND APPEARANCES —July 1, 1963

A three-judge court has been appointed in the above entitled matter in accordance with the provisions of Title 28, U.S.C. § 2284, by the Honorable Richard H. Chambers,

[File endorsement omitted]

Chief Judge of the United States Court of Appeals for the Ninth Circuit, to hear the application of plaintiffs for interlocutory injunction. The members of said three-judge court are the Honorable Stanley N. Barnes, Circuit Judge, the Honorable William C. Mathes, District Judge, and the Honorable E. Avery Crary, District Judge.

Hearing of said motion will be had on Thursday, July 11, 1963, at 9:30 a.m., in the United States Court of Appeals courtroom on the 16th floor of the United States Post Office and Courthouse Building, 312 North Spring Street, Los Angeles, California.

All affidavits and points and authorities to be considered [fol. 1291] by the court on the part of plaintiffs shall be served and filed not later than July 6, 1963, and all affidavits and points and authorities on behalf of all defendants and intervening defendants shall be served and filed not later than July 9, 1963.

All proposed intervening defendants who appeared by counsel at the hearing on the temporary restraining order held Thursday, June 27, 1963, who have not yet filed motions to intervene and answers to plaintiffs' complaint herein shall do so not later than July 5, 1963.

Counsel for all parties will file sufficient copies of all pleadings, affidavits and other documents to provide copies thereof for each of the three judges on the above mentioned court. As to documents heretofore filed, extra copies thereof should be filed forthwith.

The hearing on the application for interlocutory injunction shall be had on the pleadings and affidavits filed in accordance with this order.

The parties shall file with the Clerk of the above entitled court proposed Findings of Fact, Conclusions of Law and Judgment not later than July 9, 1963.

Dated: July 1, 1963.

E. Avery Crary, United States District Judge.

[fol. 1292]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., Plaintiffs,

ARIZONA CORPORATION COMMISSION, et al., Intervening Plaintiffs,

vs.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, Defendants.

ORDER PERMITTING INTERVENTION—July 8, 1963

This matter coming on before the Court on application of Arizona Corporation Commission, Public Utilities Commission of Colorado, Public Utilities Commission of Idaho, Board of Railroad Commissioners of Montana, Public Service Commission of Nevada, State Corporation Commission of New Mexico, Public Utility Commissioner of Oregon, Public Service Commission of Utah and Washington Utilities and Transportation Commission for leave to intervene in their official capacities, and it appearing to the Court that said applicants were parties by intervention to the proceeding before the Interstate Commerce Commission involving the subject of the complaint herein; and it further appearing that by virtue of 28 USCA § 2323 [fol. 1293] each is entitled to intervene in its official capacities as additional plaintiffs as a matter of right;

[File endorsement omitted]

It Is Ordered that the application of the above-named state agencies to intervene in their official capacities as additional plaintiffs be and it is hereby granted.

Dated this 8 day of July, 1963.

Crary, Judge.

[fol. 1294] Certificate of Service (omitted in printing).

[fol. 1295]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., Plaintiffs,

ARIZONA CORPORATION COMMISSION, et al., Intervening Plaintiffs,

vs.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, Defendants.

COMPLAINT IN INTERVENTION—Filed July 8, 1963

I

This action is to enjoin, set aside and annul an order of the Interstate Commerce Commission.

[File endorsement omitted]

II

The intervening plaintiffs, Arizona Corporation Commission, Public Utilities Commission of Colorado, Public Utilities Commission of Idaho, Board of Railroad Commissioners of Montana, Public Service Commission of Nevada, State Corporation Commission of New Mexico, Public Utility Commissioner of Oregon, Public Service Commission of Utah and Washington Utilities and Transportation Commission, are charged by statutes of their respective states with the power and duty of administer- [fol. 1296] ing laws regulating railroads within and through their respective states.

III

Each state regulatory commission named in paragraph II above, sought and obtained permission from the Interstate Commerce Commission to participate in the proceedings giving rise to the instant complaint as representatives of the interest of the public in their respective states.

IV

Intervening plaintiffs' claim for which intervention is sought is set forth generally in principal plaintiffs' complaint to enjoin, set aside, annul and suspend the order of the Interstate Commerce Commission. Intervening plaintiffs, therefore, by this reference make the allegations contained in said complaint a part hereof as if set forth herein at length, except those decided prior to the filing of this complaint.

V

Because nearly 50 percent of the total revenues realized by the principal plaintiffs herein come from transcontinental traffic, these plaintiffs are utterly dependent upon the transcontinental divisions from this traffic for revenues necessary to fulfill their service obligations to the people

of the Mountain-Pacific states. These service obligations constitute one of the factors which the Interstate Commerce Commission is compelled by § 15 (6) of the Interstate Commerce Act to take into consideration in prescribing divisions.

VI

Notwithstanding this clear requirement of the controlling statute the Commission has entered an order which totally ignores the public interest of the Mountain-Pacific states and the revenue needs of the railroads serving this territory.

[fol. 1297]

VII

Intervening plaintiffs' concern is in the following errors, among others, in the Commission's order of March 21, 1963:

1) The Commission's reliance upon freight income, as distinguished from all income derived by rail carrier from the transportation business, in determining divisions. This is an explicit violation of the requirement of § 15 (6) of the Interstate Commerce Act;

2) The Commission's reliance upon freight earnings alone deprived plaintiffs and interveners of their rights to a full and fair hearing as guaranteed by the Administrative Procedure Act. This is because reliance upon freight earnings was interjected into the case by the Examiners after the record had been closed and plaintiffs were denied any opportunity to be heard upon this departure from the norm;

3) The Commission erroneously determined that present divisions were favorable to principal plaintiffs to an extent not justified. This finding is specifically against the only evidence presented in this proceeding which establishes by a great preponderance that even present divisions do not allow principal plain-

tiffs sufficient revenue to adequately serve the public. The following conditions, among others, which are peculiar to Mountain-Pacific territories were shown to support principal plaintiffs' contentions:

[fol. 1298] (a) a growing area primarily dependent upon these railroads for adequate transportation service,

(b) that freight rates could not be further raised and still allow this segment of the country to flourish,

(c) that market competition between areas of the country forces the transcontinental railroads serving the Mountain-Pacific states to keep rates at a very minimum in order to allow traffic to flow; and

(d) that present divisions do not permit these carriers in the Mountain-Pacific territory to earn an adequate rate of return on much of their investment.

VIII

The Commission erred in failing to recognize the greater degree of urgency in the Mountain-Pacific territory for the investment of funds by the railroads for additions and betterment and new equipment. The only evidence presented before the Commission on the public reliance on the railroads was from the Mountain-Pacific states and showed a need for more adequate facilities and better car supply.

IX

The Commission failed to make clear and cogent findings absolutely essential to any change of existing divisions, based on revenue needs, namely:

1) The precise extent of the alleged revenue needs of eastern and midwestern lines was not specifically found.

2) The extent of the ability of the Mountain-Pacific lines [fol. 1299] to give up revenue otherwise theirs under present divisions was not specifically found.

3) The dollar effect of any new divisions in fulfilling revenue needs was not specifically found.

X

The Commission erroneously found that defendant carriers' passenger deficits was the cause for defendant carriers' low rate of return.

1) No substantial evidence was in the record to show comparative passenger deficits of the principal parties.

2) Reliance upon comparative passenger deficits as a means of determining financial needs for the eastern, midwestern and transcontinental railroads is an unreasonable basis and without precedent.

3) The reliance of the Commission upon passenger deficits constitutes an unlawful inducement, if not an absolute compulsion upon the Mountain-Pacific lines to drastically curtail their passenger operations; in either case it threatens the continuation of services vital to the people of the Mountain-Pacific states.

XI

Immediate and irreparable injury to the people of the Mountain-Pacific states will occur if the Commission's order is not enjoined pending final determination of this case. Examples of such injury include:

1) The costs involved in requiring a double change-over in the accounting for divisions could never be re- [fol. 1300] covered by principal plaintiffs, thus wasting money which could be used for better service to the public.

2) By depriving principal plaintiffs of their present share of divisions, principal plaintiffs' ability to offer improved service and facilities will be adversely affected, which in turn will irreparably harm the people.

3) Even if revenues wrongly taken are returned, the time lag would delay improvements and weaken present service. This will have a direct adverse effect on individuals as well as businesses in the Mountain-Pacific states.

Wherefore, intervening plaintiffs pray: 1) that the operation, enforcement and execution of the order of the Interstate Commerce Commission dated March 21, 1963, be enjoined pending the final hearing and determination of this case; 2) that after full hearing, the operation, enforcement and execution of the order be perpetually enjoined, set aside, annulled and suspended; 3) that intervening plaintiffs recover their proper costs; and 4) that the plaintiffs and intervening plaintiffs have such other and further relief in the premises as in equity may be deemed just and reasonable.

Robert Y. Thornton, Attorney General of Oregon;

Lloyd G. Hammel, Assistant Attorney General of Oregon, Chief Counsel, Oregon PUC;

John F. Weisser, Assistant Attorney General of Oregon, Of Counsel for Intervening Plaintiffs, 103 Public Service Building, Salem, Oregon 97310, Telephone—Area Code 503, 364-2171—Ext 615.

[fol. 1301] Certificate of Service (omitted in printing).

[fol. 1302]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

ORDER GRANTING MOTION OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL FOR LEAVE TO INTERVENE AS DEFENDANTS—July 8, 1963

This cause having come on for hearing on the motion of Chicago and North Western Railway Company, Chicago Great Western Railway Company, Chicago, Rock Island and Pacific Railroad Company, Green Bay and Western Railroad Company, Gulf, Mobile and Ohio Railroad Company, Illinois Central Railroad Company, Missouri Pacific Railroad Company, and Soo Line Railroad Company, for leave to intervene as defendants and to file their answers in this action, and it appearing to the Court that said movants were parties in interest to the proceedings before the Interstate Commerce Commission in which the orders under attack in this action were entered and have a statutory right to intervene in this action,

It Is Ordered that the above-named movants be and they and each of them are hereby granted leave to intervene in this action as parties defendant, to file answers to the complaints of the plaintiffs and intervening plaintiff in this action in the form attached to said movants' motion for leave to intervene, and to participate in this action as such parties.

Dated: July 8, 1963.

Enter:

Crary, United States District Judge.

[File endorsement omitted]

[fol. 1303] Proof of Service by Mail (omitted in printing).

[fol. 1304]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

ANSWER OF INTERVENING DEFENDANTS, CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL. TO COMPLAINT OF ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, INTERVENING PLAINTIFF—Filed July 9, 1963

Now come Chicago and North Western Railway Company, Chicago Great Western Railway Company, Chicago, Rock Island and Pacific Railroad Company, Green Bay and [fol. 1305] Western Railroad Company, Gulf, Mobile and Ohio Railroad Company, Illinois Central Railroad Company, Missouri Pacific Railroad Company, and Soo Line Railroad Company, and, by leave of Court first had and obtained, file this their joint and several answer to the complaint of St. Louis-San Francisco Ry. Co., intervening plaintiff, and say:

I.

These defendants admit paragraphs I and II of said intervener's complaint.

II.

These defendants, in answer to paragraph III of said intervener's complaint, admit the allegations of the paragraphs adopted from the plaintiffs' complaint except paragraph VIII; and, as to paragraph VIII adopted from the

[File endorsement omitted]

plaintiffs' complaint, refer to and incorporate herein paragraph II of their answer to the plaintiffs' complaint.

III.

These defendants, in answer to the portion of paragraph IV of said intervener's complaint which adopts paragraph IX of the plaintiffs' complaint, refer to and incorporate herein paragraph III of their answer to the plaintiffs' complaint; and admit that the intervening plaintiff was one of the midwestern lines referred to in said paragraph IV.

IV.

These defendants, in answer to paragraph V of said intervener's complaint, refer to and incorporate herein paragraphs IV, V and VI of their answer to the plaintiffs' complaint.

V.

These defendants, in answer to the portion of paragraph VI of said intervener's complaint which adopts paragraph [fol. 1306] XIII of the plaintiffs' complaint, refer to and incorporate herein paragraph VII of their answer to the plaintiffs' complaint; and admit the remaining allegations of said paragraph VI.

VI.

These defendants deny paragraphs VII-IX, inclusive, of said intervener's complaint.

VII.

Further answering said intervener's complaint, these defendants deny each and every allegation of said complaint not herein specifically admitted or otherwise specifically answered; deny that intervening plaintiff is entitled to the relief prayed for in said complaint, or any part thereof, or any relief whatsoever.

Wherefore, these defendants pray that said intervener's complaint be dismissed.

Dated: July 5, 1963.

Nye F. Morehouse, c/o Chicago and North Western Ry. Co., 400 West Madison Street, Chicago 6, Illinois;

Belnap, Spencer, Hardy & Freeman, Nuel D. Belnap, Richard M. Freeman, One North LaSalle Street, Suite 330, Chicago 2, Illinois;

Winston, Strawn, Smith & Patterson, Bryce L. Hamilton, 1400 First National Bank Bldg., Chicago 3, Illinois;

[fol. 1307]

Newlin, Tackabury & Johnson, George W. Tackabury, Frank R. Johnston, 1100 Roosevelt Building, 727 West 7th Street, Los Angeles 17, California, MAdison 8-7205, Attorneys for Chicago and North Western Ry. Co., et al.

Of Counsel:

Martin L. Cassell, 139 West Van Buren Street, Chicago 5, Illinois;

Robert H. Stahlheber, Missouri Pacific Bldg., St. Louis 3, Missouri.

[fol. 1308] Proof of Service by Mail (omitted in printing).

[fol. 1309]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

ANSWER OF INTERVENING DEFENDANTS, CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL. TO COMPLAINT OF PLAINTIFFS—Filed July 9, 1963

Now come Chicago and North Western Railway Company, Chicago Great Western Railway Company, Chicago, Rock Island and Pacific Railroad Company, Green Bay and Western Railroad Company, Gulf, Mobile and Ohio Rail-
[fol. 1310] road Company, Illinois Central Railroad Company, Missouri Pacific Railroad Company, and Soo Line Railroad Company, and, by leave of Court first had and obtained, file this their joint and several answer to the complaint of the plaintiffs, and say:

I.

These defendants admit paragraphs I-VII, inclusive, of said complaint.

II.

These defendants, in answer to paragraph VIII of said complaint, admit the first sentence thereof, and also admit the second and third sentences thereof, except that they deny that the agreed bases of divisions referred to are or for many years have been just, reasonable and equitable as to these defendants.

[File endorsement omitted]

III.

These defendants, in answer to paragraph IX of said complaint, admit the allegations thereof, but refer to and incorporate herein the statements and findings of the Interstate Commerce Commission as set forth at pages 2-6, inclusive, of Exhibit A to said complaint for a more complete description of the parties, issues and pleadings in the proceedings before said Commission.

IV.

These defendants admit paragraph X of said complaint.

V.

These defendants, in answer to paragraph XI of said complaint, admit the first sentence thereof; and deny the remaining allegations thereof except to the extent they are in accord with the report and order of the Commission of March 21, 1963; and refer to and incorporate herein the [fol. 1311] statements and findings in said report and order (Exhibits A and B to said complaint).

VI.

These defendants admit paragraph XII of said complaint.

VII.

These defendants, in answer to paragraph XIII of said complaint, admit the first, third and fifth sentences thereof; admit the making of the orders referred to in the second and fourth sentences of said paragraph, but allege that the order referred to in said fourth sentence was made on June 20, 1963, rather than June 24, 1963; and otherwise deny said second and fourth sentences.

VIII.

These defendants deny paragraphs XIV-XX, inclusive, of said complaint.

IX.

Further answering said complaint, these defendants deny each and every allegation of said complaint not herein specifically admitted or otherwise specifically answered; deny that plaintiffs are entitled to the relief prayed for in said complaint, or any part thereof, or any relief whatsoever.

Wherefore, these defendants pray that said complaint be dismissed.

Dated: July 5, 1963.

Nye F. Morehouse, c/o Chicago and North Western Ry. Co., 400 West Madison Street, Chicago 6, Illinois;

Belnap, Spencer, Hardy & Freeman, Nuel D. Belnap, Richard M. Freeman, One North LaSalle Street, Suite 330, Chicago 2, Illinois;

[fol. 1312]

Winston, Strawn, Smith & Patterson, Bryce L. Hamilton, 1400 First National Bank Bldg., Chicago 3, Illinois;

Newlin, Tackabury & Johnson, George W. Tackabury, Frank R. Johnston, 1100 Roosevelt Building, 727 West 7th Street, Los Angeles 17, California, MAdison 8-7205, Attorneys for Chicago and North Western Ry. Co., et al.

Of Counsel:

Martin L. Cassell, 139 West Van Buren Street, Chicago 5, Illinois;

Robert H. Stahlheber, Missouri Pacific Bldg., St. Louis 3, Missouri.

[fol. 1313] Proof of Service by Mail (omitted in printing).

[fol. 1314]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

ANSWER OF INTERVENING DEFENDANT, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, TO COMPLAINT OF PLAINTIFFS—Filed July 9, 1963

Chicago, Milwaukee, St. Paul and Pacific Railroad Company, an intervening defendant, in answer to the complaint of the plaintiffs, states:

I.

Intervening defendant admits the allegations of paragraphs I-VII of the complaint.

II.

Intervening defendant admits the allegations of paragraph VIII of the complaint, except intervening defendant denies that the agreed bases of divisions are just, reasonable and equitable as required by statute.

III.

Intervening defendant admits the allegations of paragraphs IX and X of the complaint.

[fol. 1315]

IV.

Intervening defendant admits the allegations of paragraph XI of the complaint, except the last sentence thereof, which it denies.

[File endorsement omitted]

V.

Intervening defendant admits the allegations of paragraphs XII and XIII of the complaint.

VI.

Intervening defendant denies the allegations of paragraphs XIV-XX of the complaint.

Wherefore, intervening defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, prays that the relief prayed for in plaintiffs' complaint, or any relief whatsoever, be denied, and that the complaint be dismissed.

Dated July 11, 1963.

Welsh & Cummins, 1204 Statler Center—900 Wilshire Blvd., Los Angeles 17, California, Telephone No. MAdison 4-3431, By Louis M. Welsh;

Raymond K. Merrill, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 888 Union Station-516 W. Jackson Blvd., Chicago 6, Illinois;

Attorneys for Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

[fol. 1316]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

ANSWER OF INTERVENING DEFENDANT, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, TO COMPLAINT OF INTERVENING PLAINTIFFS, ARIZONA CORPORATION COMMISSION, ET AL.—Filed July 9, 1963

Chicago, Milwaukee, St. Paul and Pacific Railroad Company, intervening defendant, in answer to the complaint of intervening plaintiffs, Arizona Corporation Commission, et al., states:

I.

Intervening defendant admits the allegations of paragraphs I-III of the complaint.

II.

Intervening defendant, in answer to paragraph IV of the complaint, incorporates herein by reference its answer to the complaint of the principal plaintiffs herein.

III.

Intervening defendant denies the allegations of paragraphs V-XI of the complaint.

[fol. 1317] Wherefore, intervening defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company prays that the relief prayed for in intervening plaintiffs' com-

[File endorsement omitted]

plaint, or any relief whatsoever, be denied and that the complaint be dismissed.

Dated July 11, 1963.

Welsh & Cummins, 1204 Statler Center—900 Wilshire Blvd., Los Angeles 17, California, Telephone No. MAdison 4-3431, By Louis M. Welsh;

Raymond K. Merrill, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 888 Union Station —516 W. Jackson Blvd., Chicago 6, Illinois, Raymond K. Merrill, Attorneys for Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

[fol. 1318]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., Plaintiffs,

v.

UNITED STATES OF AMERICA, et al., Defendants.

ANSWER OF INTERVENING DEFENDANT, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, TO COMPLAINT OF INTERVENING PLAINTIFF, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY—Filed July 9, 1963

Chicago, Milwaukee, St. Paul and Pacific Railroad Company, intervening defendant, in answer to the complaint of intervening plaintiff, St. Louis-San Francisco Railway Company, states:

[File endorsement omitted]

I.

Intervening defendant admits the allegations of paragraphs I and II of the complaint.

II.

Intervening defendant admits the allegations of paragraph III of the complaint, except it denies that the agreed bases of divisions are just, reasonable and equitable as required by statute, as alleged in paragraph VIII of plaintiffs' complaint and incorporated by reference in paragraph III of intervening plaintiff's complaint.

[fol. 1319] III.

Intervening defendant admits the allegations of paragraph IV of the complaint.

IV.

Intervening defendant admits the allegations of paragraph V of the complaint, except it denies the last sentence of paragraph XI of plaintiffs' complaint incorporated by reference in paragraph V of said intervening plaintiff's complaint.

V.

Intervening defendant admits the allegations of paragraph VI of the complaint.

VI.

Intervening defendant denies the allegations of paragraphs VII-IX of the complaint.

Wherefore, intervening defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company prays that the relief prayed for in intervening plaintiff's complaint, or any

relief whatsoever, be denied, and that the complaint be dismissed.

Welsh & Cummins, 1204 Statler Center—900 Wilshire Blvd., Los Angeles 17, California, Telephone No. MAdison 4-3431, By Louis M. Welsh;

Raymond K. Merrill, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 888 Union Station —516 W. Jackson Blvd., Chicago 6, Illinois, Raymond K. Merrill, Attorneys for Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

Dated July 11, 1963.

[fol. 1320]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

ORDER GRANTING MOTION OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY FOR LEAVE TO INTERVENE AS DEFENDANT—Lodged July 9, 1963

Upon motion of Chicago, Milwaukee, St. Paul and Pacific Railroad Company for leave to intervene as a party defendant and to file its answers to the complaints of plaintiffs and intervening plaintiffs, and it appearing that notice of said motion has been served on all parties entitled thereto and that applicant for intervention has an unconditional right to intervene in this action pursuant to Title 28 U.S.C. §2323,

[File endorsement omitted]

It Is Ordered, that Chicago, Milwaukee, St. Paul and Pacific Railroad Company be and it is hereby granted leave to intervene in this action as a party defendant, to file its answers to the complaints of plaintiffs and intervening [fol. 1321] plaintiffs, with full right to participate as an intervening defendant herein.

Dated: July , 1963.

Enter:

E. Avery Crary, United States District Judge.

[fol. 1322]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

INTERVENING COMPLAINT OF THE PEOPLE OF THE STATE OF CALIFORNIA, AND THE PUBLIC UTILITIES COMMISSION OF CALIFORNIA TO ENJOIN, SET ASIDE, ANNUL AND SUSPEND ORDER OF THE INTERSTATE COMMERCE COMMISSION—Lodged July 5, 1963

Intervening plaintiffs, the People of the State of California, and the Public Utilities Commission of California (hereinafter sometimes referred to as these intervener-plaintiffs), for statement of their claim against defendants allege:

1. This is an action to enjoin, set aside, annul and suspend an order entered by the Interstate Commerce [fol. 1323] Commission (hereinafter referred to as the "Commission") in administrative proceedings identified as

[File endorsement omitted]

I.C.C. Docket No. 31503, Akron, Canton & Youngstown Railroad Company, et al. v. Atchison, Topeka & Santa Fe Railway Company, et al.; I.C.C. Docket No. 31503 (Sub No. 1), Ahnapee & Western Railway Railway Company et al. v. Abilene & Southern Railway Company, et al.; I.C.C. Docket No. 31503 (Sub No. 2), Chicago Burlington & Quincy Railroad Company, et al. v. Abilene & Southern Railway Company, et al.; I.C.C. Docket No. 31503 (Sub No. 3), Chicago, Milwaukee, St. Paul & Pacific Railroad Company v. Abilene & Southern Railway Company, et al.; I.C.C. Docket No. 31503 (Sub No. 4), Louisville & Nashville Railroad Company v. Akron, Canton & Youngstown Railroad Company, et al.; and I.C.C. Docket No. 31503 (Sub No. 5), Cincinnati, New Orleans & Texas Pacific Railway Company v. Akron, Canton & Youngstown Railroad Company, et al.

2. The Public Utilities Commission of the State of California is an agency created by the constitution of the State of California and under the terms of said constitution is empowered to supervise and regulate all commercial railroads operating in California. Under the provisions of Section 307 of the Public Utilities Code of the State of California the attorney for said Commission is authorized to represent and appear for the People of the State of California and the Commission in proceedings of this character.

3. The People of the State of California, and the Public Utilities Commission of said State were duly authorized, by action of said Public Utilities Commission, to appear in this proceeding as intervening plaintiffs. A fair, just [fol. 1324] and equitable division of the joint rates involved herein is important to the People of the State of California and the economy of said State.

4. This action arises out of a dispute as to the lawful and proper division of the revenues produced by transcontinental movements of freight—that is, freight traffic moving between Mountain-Pacific territory on the one hand,

and either Midwestern or Official territory on the other. Official territory (also referred to as Eastern territory), is generally east of the Mississippi River and north of the Ohio River. Midwestern territory is generally west of the Mississippi River and east of the Rocky Mountains and Montana. Mountain-Pacific territory comprises Montana and all territory in the Rocky Mountains and west. Both the Eastern railroads and the Midwestern railroads filed complaints seeking drastic increases in their divisions from this traffic at the expense of the railroads serving Mountain-Pacific territory.

5. Because nearly 50 per cent of their total revenues comes from transcontinental traffic, the Mountain-Pacific lines are dependent upon their divisions from this traffic for the revenues necessary to fulfill their service obligations to the people of the Mountain-Pacific States. These public service obligations constitute one of the factors which the Commission is compelled by Section 15(6) of the Interstate Commerce Act to take into consideration in prescribing divisions. Consequently, intervener-plaintiffs, as the representative of the public of the State of California in such [fol. 1325] matters, intervenes herein to assure a proper presentation of the facts relating to this critical issue.

6. Notwithstanding this clear requirement of the controlling statute as brought out by the Mountain-Pacific lines themselves and emphasized by the participation of these intervener-plaintiffs and other state regulatory commissions in the Mountain-Pacific area, the Commission has entered an order which ignores the revenue needs of the lines serving Mountain-Pacific territory. This order, dated March 21, 1963 and served upon the parties on March 28, 1963, increases the divisions of both the Eastern and the Midwestern lines by amounts which, though not specified either in the order or in the Commission's accompanying report, obviously run into many millions of dollars a year.

7. The report accompanying the March 21, 1963 order makes it plain that the principal basis of that order is: (1)

the Commission's "conclusion that the eastern railroads are in a less advantageous situation as freight carriers than those in the western district" (Report, sheet 67); and (2) the Commission's "view that the midwestern lines rank below the transcontinental roads in earning power as judged by satistics for the post-war period and that their prospects for sustained or increased freight income are less promising than those of the defendant transcontinental railroads" (Report, sheet 70).

8. The above-described basis for the Commission's March 21, 1963 order is plainly unlawful under Section 15 [fol. 1326] (6) of the Interstate Commerce Act for at least four separate reasons, namely:

(a) The Commission's reliance upon freight income as distinguished from all income received by the carriers from their transportation business constitutes a violation of the terms of the requirements of Section 15 (6);

(b) Even if the Commission were permitted by Section 15 (6) to isolate freight earnings for separate consideration in weighing the relative revenue needs of groups of carriers, the statistics relied upon in the report were never intended to and in fact do not provide a measure of the actual effect on carrier earnings that would result from discontinuance of passenger service.

(c) The Commission failed to make any findings to justify its reliance upon the data in question as an accurate measure of freight earnings or to explain its abrupt departure from a long line of its own decisions that is squarely inconsistent with any such treatment of these data;

(d) The Commission's reliance upon this view as to freight earnings also deprived the intervener-plaintiffs of their right to a fair hearing as guaranteed by the Administrative Procedure Act, the Interstate Commerce Act and the Federal Constitution, for this view

was injected into the case by the Examiners after the record had been closed and intervener-plaintiffs were denied any opportunity at all to present evidence which [fol. 1327] would demonstrate beyond doubt that data used by the Commission bear no rational relation whatever to the carriers' actual freight earnings.

9. The Commission's order is further unlawful by reason of its failure to make findings absolutely essential to any change in existing divisions based upon revenue needs. Specifically, the Commission should have found but did not find:

(a) The extent of the allegedly greater revenue needs of the eastern and midwestern lines;

(b) the extent of the ability of the Mountain-Pacific lines to give up revenues otherwise rightfully theirs in order to meet the revenue needs of their connections without impairing their own ability to meet the service needs of the public of Mountain-Pacific territory; and

(c) the dollar effect of any new divisions prescribed.

10. The March 21, 1963 order is also unlawful by reason of the Commission's failure to make findings necessary rationally to support its provisions. Appendices B and C to the Commission's report, prescribing the new divisions for the Eastern and Midwestern railroads, respectively, set up entirely new divisional structures. Yet the report contains no findings to justify the particular divisions prescribed.

11. By its terms, the March 21, 1963 order is to be made effective on and after July 1, 1963. And although the Com- [fol. 1328] mission postponed the date for filing petitions for reconsideration of that order to July 26, 1963, it refused to modify that effective date. Consequently, the harm to be occasioned to the public by the change in divisions prescribed by the March 21, 1963 order can fully be averted

only by court action enjoining enforcement of said order on and after July 1, 1963, pending the trial of this proceeding. All administrative remedies that would have protected against such harm have been exhausted.

12. The Commission threatens to enforce the March 21, 1963 order requiring that new basis of divisions be applied on and after July 1, 1963, and that order, if enforced, would cause immediate and irreparable injury to the people of the State of California as represented by intervener-plaintiffs here. Since the March 21, 1963 order rests upon the premise that the Mountain-Pacific lines' divisions should be decreased because of their excessive passenger deficits, the order constitutes an unlawful inducement to, if indeed it is not an absolute compulsion upon, the Mountain-Pacific lines drastically to curtail their passenger operations; in either case, it threatens a continuation of services vital to the people of the State of California.

Wherefore, intervener-plaintiffs pray:

1. That the operation, enforcement and execution of the order of March 21, 1963 be enjoined pending the final hearing and determination of this action.

[fol. 1329] 2. That the operation, enforcement and execution of the order of March 21, 1963, be perpetually enjoined and permanently set aside, annulled and suspended.

3. That intervener-plaintiffs recover their proper costs.

4. That intervener-plaintiffs have such other and further relief in the premises as in equity may be deemed meet and just by this Honorable Court.

Dated: July 5, 1963.

Richard E. Tuttle, Roderick B. Cassidy, J. Thomason Phelps, Cyril M. Saroyan, By Cyril M. Saroyan, Attorneys for Intervening Plaintiffs the People of the State of California, and the Public Utilities Commission of California.

[fol. 1330] Affidavit of Service (omitted in printing).

[fol. 1333]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

ORDER GRANTING MOTION OF AMADOR CENTRAL RAILROAD COMPANY, ET AL., TO INTERVENE AS PLAINTIFFS—July 9, 1963

Good cause having been shown for the granting of the Motion of Amador Central Railroad Company, et al., to Intervene as Plaintiffs in this action;

Now, Therefore, It Is Ordered that the motion of Amador Central Railroad Company, et al., to intervene as plaintiffs, which said motion was filed July 5, 1963, is hereby granted and leave is granted to file the Complaint in Intervention of Amador Central Railroad Company, et al., a copy [fol. 1334] of which was attached to said motion.

Dated: July 9, 1963.

Crary, United States District Judge.

[File endorsement omitted]

[fol. 1335]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

COMPLAINT IN INTERVENTION OF AMADOR CENTRAL RAILROAD COMPANY, ET AL.—Filed July 9, 1963

1. Amador Central Railroad Company; The Arcata and Mad River Rail Road Company; Butte, Anaconda & Pacific Railway Company; California Western Railroad; Camas Prairie Railroad Company; Camino, Placerville & Lake Tahoe Railroad Company; Central California Traction Company; The Colorado and Wyoming Railway Company; Gulf, Colorado and Santa Fe Railway Company; Holton [fol. 1336] Inter-Urban Railway Company; Inter-California Railway Company; Klamath Northern Railway Company; Longview, Portland & Northern Railway Company; Magma Arizona Railroad Company; McCloud River Railroad Company; Modesto and Empire Traction Company; Nacozari Rail Road Company; Nevada Northern Railway Company; Northwestern Pacific Railroad Company; Oregon, California & Eastern Railway Company; Oregon Electric Railway Company; Oregon Pacific and Eastern Railway Company; Oregon Trunk Railway; Pacific Coast R.R. Co.; Pacific Electric Railway Company; Panhandle and Santa Fe Railway Company; Petaluma and Santa Rosa Railroad Company; Portland Traction Company; Sacramento Northern Railway; Salt Lake, Garfield and Western Railway Company; San Diego & Arizona Eastern Railway Company; Sierra Railroad Company; Spokane International Railroad Company; Spokane, Portland and Seattle

[File endorsement omitted]

Railway Company; Stockton Terminal and Eastern Railroad; Sunset Railway Company; Tidewater Southern Railway Company; Tijauna and Tecate Railway Company; Tooele Valley Railway Company; Tucson, Cornelia and Gila Bend Railroad Company; Utah Railway Company; Visalia Electric Railroad Company; Walla Walla Valley Railway Company; Yakima Valley Transportation Co.; and Yreka Western Railroad Company (hereinafter referred to as intervener-plaintiffs) are common carriers by railroad subject to the Interstate Commerce Act. Each of the intervener-plaintiffs was a party in interest in the proceedings before the Interstate Commerce Commission which culminated in the Commission's order of March 21, 1963, as modified by the order of June 20, 1963. Unless the relief sought by the plaintiffs in their complaint herein, and by the intervener-plaintiffs in this complaint, is [fol. 1337] granted, the intervener-plaintiffs will be bound by said orders of the Commission.

2. Intervener-plaintiffs hereby adopt and incorporate herein by reference, as though fully rewritten, each and every, all and singular, the statements and allegations made in Paragraph I and in Paragraphs III through XX, inclusive, of the complaint heretofore filed in this action by the plaintiffs.

WHEREFORE, intervener-plaintiffs pray:

1. That the operation, enforcement and execution of the order of March 21, 1963, be enjoined pending the final hearing and determination of this action.

2. That the operation, enforcement and execution of the order of March 21, 1963, be perpetually enjoined and permanently set aside, annulled and suspended.

3. That intervener-plaintiffs recover their proper costs.

4. That intervener-plaintiffs have such other and further relief in the premises as in equity may be deemed meet and just by this Honorable Court.

[fol. 1338] Dated: July 5, 1963.

O'Melveny & Myers, Homer I. Mitchell, Warren M. Christopher, Donald M. Wessling, Sidley, Austin, Burgess & Smith, Douglas F. Smith, Howard J. Trienens, George L. Saunders, Jr., By Homer I. Mitchell, Donald M. Wessling, Attorneys for Intervener-Plaintiffs Amador Central Railroad Company, et al.

Of Counsel:

S. R. Brittingham, Jr., Frank S. Farrell, Lawrence W. Hobbs, Thormund A. Miller, Ernest Porter, Howard V. Rhedin, Howard E. Roos, L. E. Torinus, Jr., E. L. Van Dellen.

[fol. 1339] Affidavit of Service (omitted in printing).

[fol. 1342]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

ORDER GRANTING MOTION TO INTERVENE—July 10, 1963

This matter coming on before the Court on Motion of the People of the State of California and the Public Utilities Commission of California to intervene as Plaintiffs, and it appearing to the Court that said movants were parties by intervention to the proceeding before the Interstate Commerce Commission involving the subject of the complaint herein; and it further appearing that by virtue of

[File endorsement omitted]

28 USCA § 2323 they are entitled to intervene as additional plaintiffs as a matter of right;

[fol. 1343] Now Therefore It Is Ordered that the Motion of the People of the State of California and the Public Utilities Commission of California to intervene as additional plaintiffs be and it is hereby granted; and it is further ordered that the Intervening Complaint of said additional plaintiffs may be filed.

Dated: July 10, 1963.

E. Avery Crary, Judge.

[fol. 1344]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

ANSWER OF INTERVENING DEFENDANTS, CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL., TO INTERVENING COMPLAINT OF THE PEOPLE OF THE STATE OF CALIFORNIA, ET AL. —Filed July 25, 1963

Now come Chicago and North Western Railway Company, Chicago Great Western Railway Company, Chicago, Rock Island and Pacific Railroad Company, Green Bay and [fol. 1345] Western Railroad Company, Gulf, Mobile and Ohio Railroad Company, Illinois Central Railroad Company, Missouri Pacific Railroad Company, and Soo Line Railroad Company and file this their joint and several answer to the intervening complaint of the People of the State of California, et al, and say:

[File endorsement omitted]

I.

These defendants admit paragraphs 1, 2 and 3 of said intervening complaint.

II.

These defendants admit paragraph 4 of said intervening complaint, except that they deny that the increases in divisions sought by the Midwestern Railroads in the proceedings before the Interstate Commerce Commission were drastic.

III.

These defendants deny paragraph 5 of said intervening complaint.

IV.

These defendants, in answer to paragraph 6 of said intervening complaint, deny the first sentence thereof and admit the second sentence thereof.

V.

These defendants deny paragraphs 7-10 inclusive, of said intervening complaint.

VI.

These defendants, in answer to paragraph 11 of said intervening complaint, admit the first and second sentences thereof and deny the third and fourth sentences thereof.

VII.

These defendants deny paragraph 12 of said intervening complaint.

[fol. 1346] VIII.

Further answering said intervening complaint, these defendants deny each and every allegation of said complaint

not herein specifically admitted or otherwise specifically answered; deny that plaintiffs are entitled to the relief prayed for in said complaint, or any part thereof, or any relief whatsoever.

Wherefore, these defendants pray that said intervening complaint be dismissed.

Dated: July 25, 1963.

Nye F. Morehouse, c/o Chicago and North Western Ry. Co., 400 West Madison Street, Chicago 6, Illinois;

Belnap, Spencer, Hardy & Freeman, Nuel D. Belnap, Richard M. Freeman, One North LaSalle Street, Suite 330, Chicago 2, Illinois;

Winston, Strawn, Smith & Patterson, Bryce L. Hamilton, 1400 First National Bank Bldg., Chicago 3, Illinois;

Newlin, Tackabury & Johnston, George W. Tackabury, Frank R. Johnston, 1100 Roosevelt Building, 727 West 7th Street, Los Angeles 17, California, MAdison 8-7205;

Attorneys for Intervening Defendants Chicago and North Western Ry. Co., et al.

Of Counsel:

Martin L. Cassell, 139 West Van Buren St., Chicago 5, Illinois;

Robert H. Stahlheber, Missouri Pacific Bldg., St. Louis 3, Missouri.

[fol. 1347] Proof of Service by Mail (omitted in printing).

[fol. 1350]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

ANSWER OF INTERVENING DEFENDANTS, CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL. TO COMPLAINT IN INTERVENTION OF AMADOR CENTRAL RAILROAD COMPANY, ET AL.—Filed July 25, 1963

Now come Chicago and North Western Railway Company, Chicago Great Western Railway Company, Chicago, Rock Island and Pacific Railroad Company, Green Bay [fol. 1351] and Western Railroad Company, Gulf, Mobile and Ohio Railroad Company, Illinois Central Railroad Company, Missouri Pacific Railroad Company, and Soo Line Railroad Company and file this their joint and several answer to the complaint in intervention of Amador Central Railroad Company, et al, and say:

I.

These defendants admit paragraph 1 of said complaint in intervention.

II.

These defendants, in answer to paragraph 2 of said complaint in intervention, which adopts and incorporates paragraph I and paragraphs III through XX, inclusive, of the plaintiffs' complaint, refer to and incorporate herein paragraphs I through VIII of the answer of these defendants to the plaintiffs' complaint.

[File endorsement omitted]

III.

Further answering said complaint in intervention, these defendants deny each and every allegation of said complaint not herein specifically admitted or otherwise specifically answered; deny that plaintiffs are entitled to the relief prayed for in said complaint, or any part thereof, or any relief whatsoever.

Wherefore, these defendants pray that said complaint in intervention be dismissed.

Dated: July 25, 1963.

Nye F. Morehouse, c/o Chicago and North Western Ry. Co., 400 West Madison Street, Chicago 6, Illinois;

Belnap, Spencer, Hardy & Freeman, Nuel D. Belnap, Richard M. Freeman, One North LaSalle Street, Suite 330, Chicago 2, Illinois;

[fol. 1352] Winston, Strawn, Smith & Patterson, Bryce L. Hamilton, 1400 First National Bank Bldg., Chicago 3, Illinois;

Newlin, Tackabury & Johnston, George W. Tackabury, Frank R. Johnston, 1100 Roosevelt Building, 727 West 7th Street, Los Angeles 17, California, MAdison 8-7205;

Attorneys for Intervening Defendants Chicago and North Western Ry. Co., et al.

Of Counsel:

Martin L. Cassell, 139 West Van Buren Street, Chicago 5, Illinois;

Robert H. Stahlheber, Missouri Pacific Bldg., St. Louis 3, Missouri.

[fol. 1353] Proof of Service by Mail (omitted in printing).

[fol. 1356]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., Plaintiffs,

v.

UNITED STATES OF AMERICA, et al., Defendants.

ANSWER OF INTERVENING DEFENDANTS, CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL. TO COMPLAINT IN INTERVENTION OF ARIZONA CORPORATION COMMISSION, ET AL.—Filed July 25, 1963

Now come Chicago and North Western Railway Company, Chicago Great Western Railway Company, Chicago, Rock Island and Pacific Railroad Company, Green Bay and [fol. 1357] Western Railroad Company, Gulf, Mobile and Ohio Railroad Company, Illinois Central Railroad Company, Missouri Pacific Railroad Company, and Soo Line Railroad Company and file this their joint and several answer to the complaint in intervention of Arizona Corporation Commission, et al, and say:

I.

These defendants admit paragraphs I and II of said complaint in intervention.

II.

These defendants, in answer to paragraph III of said complaint in intervention, admit the allegations thereof,

[File endorsement omitted]

except that they deny that Arizona Corporation Commission was a party to the proceedings before the Interstate Commerce Commission at any time prior to June 21, 1963.

III.

These defendants, in answer to paragraph IV of said complaint in intervention, which adopts and incorporates the allegations in the plaintiffs' complaint, refer to and incorporate herein paragraphs I through VIII of the answer of these defendants to plaintiffs' complaint.

IV.

These defendants deny paragraphs V-XI, inclusive, of said complaint in intervention.

V.

Further answering said complaint in intervention, these defendants deny each and every allegation of said complaint not herein specifically admitted or otherwise specifically answered; deny that intervening plaintiff is entitled to the relief prayed for in said complaint, or any part thereof, or any relief whatsoever.

Wherefore, these defendants pray that said complaint in [fol. 1358] intervention be dismissed.

Dated: July 25, 1963.

Nye F. Morehouse, c/o Chicago and North Western Ry. Co., 400 West Madison Street, Chicago 6, Illinois;

Belnap, Spencer, Hardy and Freeman, Nuel D. Belnap, Richard M. Freeman, One North LaSalle Street, Suite 330, Chicago 2, Illinois;

Winston, Strawn, Smith & Patterson, Bryce L. Hamilton, 1400 First National Bank Bldg., Chicago 3, Illinois;

Newlin, Tackabury & Johnston, George W. Tackabury, Frank R. Johnston, 1100 Roosevelt Building, 727 West 7th Street, Los Angeles 17, California, MAdison 8-7205;

Attorneys for Intervening Defendants Chicago and North Western Ry. Co., et al.

Of Counsel:

Martin L. Cassell, 139 West Van Buren Street, Chicago 5, Illinois;

Robert H. Stahlheber, Missouri Pacific Bldg., St. Louis 3, Missouri.

[fol. 1359] Proof of Service by Mail (omitted in printing).

[fol. 1362]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

ORDER SUBMITTING PLAINTIFF'S APPLICATION FOR INTERLOCUTORY INJUNCTION AND CONTINUING IN EFFECT TEMPORARY RESTRAINING ORDER—Filed July 29, 1963

The application of plaintiffs and intervenor-plaintiffs for interlocutory injunction having been heard and argued by counsel for interested parties at 9:30 a.m., on July 11, 1963, before the above entitled court, Los Angeles, California,

[File endorsement omitted]

It Is Now Ordered that the said application for interlocutory injunction now stands submitted, and

It Is Further Ordered that the temporary restraining order issued herein on June 27, 1963, shall continue in full force and effect until the determination by this three-judge court of the said application for granting of an interlocutory injunction.

Dated: July 2, 1963.

Stanley N. Barnes, United States Circuit Judge.

[fol. 1363]

Wm. C. Mathes, United States District Judge.

E. Avery Crary, United States District Judge.

[fol. 1364]

Bond No. J-6095922

NATIONAL SAFETY CORPORATION
Home Office
San Francisco

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, GREAT NORTHERN RAILWAY COMPANY, LOS ANGELES JUNCTION RAILWAY COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, SANTA MARIA VALLEY RAILWAY COMPANY, SOUTHERN PACIFIC COMPANY, TRONA RAILWAY COMPANY, UNION PACIFIC RAILROAD COMPANY, VENTURA COUNTY RAILWAY COMPANY, and THE WESTERN PACIFIC RAILROAD COMPANY, Plaintiffs,

vs.

UNITED STATES OF AMERICA, and
INTERSTATE COMMERCE COMMISSION, Defendants.

UNDERTAKING ON INTERLOCUTORY INJUNCTION—
Filed August 5, 1963

Whereas, the above-named Plaintiffs have commenced an action, and issued summons therein in the District Court of the United States for the Southern District of California Central Division, against the above-named Defendants, and have applied for an interlocutory injunction in said action, against the said Defendants, enjoining and restraining them from the commission of certain acts, as in the complaint filed in the said action are more particularly set forth and described.

[File endorsement omitted]

Now, Therefore, National Surety Corporation, a body corporate, duly incorporated under the laws of the State of New York, and duly licensed to transact a general surety business in the State of California, in consideration of the premises, and of the issuing of said interlocutory injunction undertakes in the sum of Fifty Thousand and no/100 Dollars ($50,000.00) as security for the payment of such costs and damages as may be incurred or suffered by any party as provided in Rule 65 (c), Federal Rules of Civil Procedure.

It Is Further Agreed by the Surety, that in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

[fol. 1365] Signed, Sealed, and dated this 18th day of July, 1963.

National Surety Corporation, Surety; Arden L. Day, Jr., Attorney-in-Fact.

Examined and recommended for approval as provided in Rule 8.

Homer I. Mitchell, Attorney.

Approved this 3rd day of August, 1963.

E. Avery Crary, Approved.

State of California
County of Los Angeles

On this 18th day of July, in the year 1963, before me, Charles F. Rupprecht, a Notary Public in and for said County and State, personally appeared Arden L. Day, Jr. known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the National Surety Corporation, and acknowledged to me that he subscribed the name of the National Surety Corporation thereto as principal, and his own name as Attorney-in-fact.

In Witness Whereof, I have hereto set my hand and affixed my official seal, at my office, in said County and State, the day and year in this certificate first above written.

Charles F. Rupprecht, Notary Public in and for said County and State. My commission expires January 26, 1967.

[fol.1366]

[Stamp—Filed—Aug 5 1963—Clerk, U. S. District Court—Southern District of California—By (Illegible), Deputy]

[Stamp—Lodged—Jul 24 1963—Clerk, U. S. District Court—Southern District of California—By (Illegible), Deputy]

[Stamp—Entered—Aug 6 1963—Clerk, U. S. District Court—Southern District of California—By (Illegible), Deputy]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., Plaintiffs,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW—August 3, 1963

The application of plaintiffs, joined in by intervening plaintiffs, for an interlocutory injunction came on for hearing on July 11, 1963 before the Honorable Stanley N. Barnes, Circuit Judge, and the Honorable William C.

Mathes and the Honorable E. Avery Crary, District Judges, sitting as a district court of three judges appointed pursuant to the provisions of Sections 2284 and 2325 of Title 28, United States Code, plaintiffs, intervening plaintiffs, defendants and intervening defendants being represented by their attorneys of record, and it appearing that the Clerk of the above entitled Court by registered [fol. 1367] mail gave at least five days' notice of said hearing to the Attorney General of the United States, to the United States Attorney for the Southern District of California, and to persons who had intervened as defendants, as required by Section 2284 of Title 28, United States Code, and the matter having been heard upon the pleadings, affidavits and memoranda of points and authorities on file herein, and the Court having heard oral argument and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. On March 28, 1963, the Interstate Commerce Commission issued an Order dated March 21, 1963, by which it prescribed changes in the present basis upon which the revenues from transcontinental freight traffic are divided.

2. The new basis of revenue divisions prescribed in the March 21, 1963 Order would in general increase the proportions of transcontinental freight revenues payable to Eastern and nearly all Midwestern railroads and would in general decrease the proportion of such revenues payable to Mountain-Pacific railroads. (Plaintiffs and intervening plaintiffs Amador Central Railroad Company, et al. will sometimes be referred to hereinafter as "Mountain-Pacific railroads".) The change in the division of revenues produced by the Order would substantially reduce the revenues of Mountain-Pacific railroads.

[fol. 1368] 3. The Order of March 21, 1963 provided that it should become effective as of July 1, 1963.

4. On April 19, 1963, the Commission issued an Order dated April 12, 1963, in which it extended the time for filing petitions for reconsideration of the March 21, 1963 Order to July 26, 1963, and it extended the time for filing replies to such petitions to September 11, 1963.

5. On April 26, 1963, the Mountain-Pacific railroads filed a Petition for Modification of Effective Date in which they asked the Commission to postpone the July 1, 1963 effective date designated in the March 21, 1963 Order pending disposition of the petitions for reconsideration to be filed pursuant to the Commission's April 12, 1963 Order. The St. Louis-San Francisco Railway and the Missouri-Kansas-Texas Railroad filed a petition in support of the Mountain-Pacific railroads' Petition.

6. On June 24, 1963, the Commission issued an Order dated June 20, 1963, in which it denied all petitions for modification of effective date.

7. Unless enjoined, restrained or suspended by this Court, the Order of the Commission dated March 21, 1963, as amended by its Order dated June 20, 1963, will become effective as of July 1, 1963, and Mountain-Pacific railroads will be required to put into effect the new bases of divisions therein prescribed and otherwise to comply with said Order, under penalties prescribed by law.

[fol. 1369] 8. On June 25, 1963, plaintiffs filed this action to enjoin, set aside, annul and suspend the Commission's Order of March 21, 1963, as amended by the Order of June 20, 1963. As a part of their action, plaintiffs sought a Temporary Restraining Order and an Interlocutory Injunction to maintain the *status quo* pending the final hearing and determination of this action.

9. On June 26, 1963, the St. Louis-San Francisco Railway Company filed a Motion to Intervene and to file a Complaint as an intervening plaintiff.

10. Pursuant to the application of plaintiffs, the Court set June 27, 1963 as the date for hearing of their Motion for Temporary Restraining Order.

11. The defendants United States of America and Interstate Commerce Commission were notified of the June 27, 1963 hearing and appeared through counsel to state that they neither supported nor opposed plaintiffs' Motion.

12. Thirteen Eastern railroads filed a Motion to Intervene as defendants and to file an Answer to plaintiffs' Complaint and appeared at the June 27, 1963 hearing to oppose the Motion for Temporary Restraining Order.

13. Eight Midwestern railroads appeared at the June 27, [fol. 1370] 1963 hearing and opposed the Motion for Temporary Restraining Order.

14. On June 27, 1963, the Motion for Temporary Restraining Order was granted, and an Order was entered restraining enforcement of the Order of the Interstate Commerce Commission dated March 21, 1963, pending the hearing and determination by the full statutory Court on plaintiffs' Application for an Interlocutory Injunction. The Temporary Restraining Order also provided: "Nothing in this Temporary Restraining Order shall preclude the three-judge statutory court, in granting or denying plaintiffs' Application for an Interlocutory Injunction, from specifying terms and conditions to be applicable to the division of rates on transcontinental freight shipments effective on and after July 1, 1963."

15. On June 27, 1963, the Motions to Intervene of the St. Louis-San Francisco Railway Company and the thirteen Eastern railroads were granted.

16. On July 1, 1963, a procedural Order was entered setting July 11, 1963 as the date for hearing the Application for an Interlocutory Injunction; the Order further provided that plaintiffs and intervening plaintiffs should file any supplemental affidavits and memoranda of points

and authorities to be relied upon at the hearing by July 6, 1963; that defendants and intervening defendants should [fol. 1371] file any supplemental affidavits and memoranda of points and authorities in opposition to the Application by July 9, 1963, and that all parties should file proposed findings of fact, conclusions of law and judgments by July 9, 1963.

17. On July 5, 1963, the Mountain-Pacific railroads not previously parties to the action filed a joint Motion to Intervene and to file a Complaint as intervening plaintiffs.

18. On July 5, 1963, the People of the State of California and the Public Utilities Commission of said State filed a Motion to Intervene and to file a Complaint as an intervening plaintiff.

19. On July 5, 1963, the regulatory bodies charged with the responsibility of regulating railroad transportation in the States of Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah and Washington filed a joint Motion to Intervene and to file a Complaint as intervening plaintiffs.

20. On July 5, 1963, the eight Midwestern railroads that had appeared through counsel at the June 27, 1963 hearing to oppose issuance of a Temporary Restraining Order, filed a Motion to Intervene and to file an Answer to the Complaint and to Intervening Complaint of the St. Louis-San Francisco Railway Company.

21. On July 8, 1963, Chicago, Milwaukee, St. Paul & [fol. 1372] Pacific Railroad Company filed a Motion to Intervene and to file an Answer to the Complaint and to the Intervening Complaint of the St. Louis-San Francisco Railway Company.

22. On or about July 9, 1963, twenty-six Eastern railroads (The Akron, Canton & Youngstown Railroad Company, et al.) filed a Motion to Intervene and to file an

Answer to the Complaint and to the Intervening Complaint of the St. Louis-San Francisco Railway Company.

23. Subsequent to June 27, 1963, and prior to or at the hearing of July 11, 1963, upon the applications for an Interlocutory Injunction, the motions to intervene of the following interveners were granted: the Mountain-Pacific railroads not previously parties to the action; the people of the State of California and the Public Utilities Commission of said State; the regulatory bodies charged with responsibility of regulating railroad transportation in the States of Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah and Washington; the eight Midwestern railroads; the Chicago, Milwaukee, St. Paul & Pacific Railroad Company; and the twenty-six Eastern railroads (The Akron, Canton & Youngstown Railroad Company, et al.).

24. The changes prescribed in the Order of March 21, 1963 would in general result in increases in the transcontinental revenue divisions of all of the Eastern railroads subject to the Order and of nearly all of the Midwestern [fol. 1373] railroads subject to the Order, including the Southern Railway and the Missouri-Illinois Railroad operating in the East, and many railroads operating in the Midwest, which are not subject to the jurisdiction of this Court.

25. The making of the changes in transcontinental divisions prescribed in the March 21, 1963 Order, as amended, would impose substantial burdens upon the accounting departments of the Mountain-Pacific railroads. These burdens are of three different kinds:

(a) Changes in the programming of electronic equipment used in making these divisions and thus impose a direct and readily measurable added accounting expense in the amount of $25,000 for the Union Pacific, $65,000 for the Santa Fe, $170,000 for the Southern Pacific, $20,000 for the Northern Pacific, $10,000 for the Great Northern, and $20,000 for the Western Pacific;

(b) Substantial additional direct accounting expenses which, although not associated with a change-over in machine accounting and therefore less susceptible to dollar measurement, would create serious burdens for plaintiffs' accounting departments;

(c) Because transcontinental traffic is such a large part of plaintiffs' total business and therefore such a [fol. 1374] large part of the workload of plaintiffs' accounting departments, and because of the limited number of trained personnel available to perform this highly specialized work, a change-over in the bases for dividing transcontinental rates would delay a number of important projects that are now being progressed by plaintiffs to modernize their accounting and otherwise produce substantial savings.

26. Under the Railway Accounting Rules, interline settlements of transcontinental revenues are made on a monthly basis within 20 days after the close of each month. Because Eastern and Midwestern railroads collect from the shippers revenues generally in excess of the amounts which they are actually entitled to keep, this delay in the settlement of transcontinental revenues brings about a situation in which the Eastern and Midwestern railroads, as a group, regularly have in their possession many millions of dollars that belong to the Mountain-Pacific railroads.

27. The Chicago, Milwaukee, St. Paul & Pacific Railroad Company operates as an Eastern railroad, as a Midwestern railroad and as a Mountain-Pacific railroad. Under the Order of the Commission dated March 21, 1963, as amended, the Chicago, Milwaukee, St. Paul & Pacific Railroad Company would receive as a Midwestern railroad alone increased revenues in an amount that is more than twice the amount of revenues which that railroad would lose as [fol. 1375] a Mountain-Pacific railroad.

Conclusions of Law

1. This Court has jurisdiction under Sections 2284 and 2324 of Title 28 of the United States Code to restrain or suspend, in whole or in part, pending the final hearing and determination of this action, the enforcement, operation and execution of the Orders of the Interstate Commerce Commission.

2. The Complaints filed by the plaintiffs and the intervening plaintiffs raise substantial questions as to the lawfulness of the Commission's Order of March 21, 1963, as amended by the Commission's Order of June 20, 1963.

3. The following irreparable damage will result to Mountain-Pacific railroads (as defined in the Findings of Fact) and to St. Louis-San Francisco Railway Company if the Commission's Order dated March 21, 1963, is allowed to become effective as of July 1, 1963, and is set aside, annulled, suspended, or permanently enjoined by this Court:

(a) A multiplicity of suits would be required for them to recover the differences between the divisional revenues provided by the Commission's Order and the divisional revenues provided by the presently effective agreements of the railroads;

[fol. 1376] (b) Multiple change-overs would be required in their elaborate accounting systems with the consequent disruption of their accounting departments and delays of other projects.

4. No substantial injury would be suffered by the defendants or any of the intervening defendants as a result of the issuance of an Interlocutory Injunction containing the protective conditions provided in Paragraph 7 hereof.

5. The public interest would not be adversely affected by the issuance of such an Interlocutory Injunction.

6. Plaintiffs and intervening plaintiffs are entitled to an Interlocutory Injunction enjoining, restraining and sus-

pending the enforcement, operation and execution of the Order of the Interstate Commerce Commission dated March 21, 1963, as amended by the Order of that Commission dated June 20, 1963, in the proceedings before that Commission in its Docket No. 31503 and Sub. Nos., which Order became effective by its terms on and after July 1, 1963, pending the final hearing and determination of this action in this Court, or until further order of this Court.

7. The Interlocutory Injunction ordered by this Court shall be subject to the following conditions:

[fol. 1377] (a) The conditions shall be binding upon plaintiffs, intervening plaintiffs Amador Central Railroad Company, et al., and intervening plaintiff St. Louis-San Francisco Railway Company, hereinafter referred to as "applicants for the Interlocutory Injunction."

(b) If the aforesaid Order of the Interstate Commerce Commission dated March 21, 1963, as amended by the Order dated June 20, 1963, is not permanently enjoined, set aside, annulled or suspended by this Court upon final hearing and determination of this action:

(i) The Order of the Interstate Commerce Commission dated March 21, 1963, as amended June 20, 1963, is deemed to be effective for all purposes as of and from July 1, 1963.

(ii) Where the divisions presently in effect on transcontinental freight shipments produce revenues for any railroad subject to the Commission's Order which are in excess of the revenues that would have been produced by the new divisions prescribed by the Commission, such net differences constitute an indebtedness of each such railroad. Each of the applicants for the Interlocutory Injunction shall resettle with all railroads covered by the Commission's Order, whether or not parties to this action, on the basis of

the divisions prescribed by the Commission in its [fol. 1378] aforesaid Order. In addition to any other right of set off, any such indebtedness may be set off by the creditor railroad against any balance it may have on hand which would otherwise be payable to the debtor carrier on account of interline settlements.

(iii) To compensate for damages that any railroad would incur as a result of the issuance of this Interlocutory Injunction because of the loss of the use of money, each applicant for the Interlocutory Injunction shall pay interest from the accounting monthly settlement dates prescribed by the Railway Accounting Rules at a rate or rates to be fixed by the Court at the time of the determination of such indebtedness of each such applicant, and this Court reserves jurisdiction to determine said rate or rates and the total amount of said interest and to order its payment.

(iv) Applicants for the Interlocutory Injunction shall reimburse all intervening defendants for additional accounting expenses, if any, and any other damages incurred as a result of this Interlocutory Injunction.

(v) In the event the Chicago, Milwaukee, St. Paul & Pacific Railroad Company should refuse to resettle with interest the divisions in which it partici- [fol. 1379] pates as a railroad operating in Mountain-Pacific territory, payment by applicants for the Interlocutory Injunction of the debts and damages to which the Chicago, Milwaukee, St. Paul & Pacific Railroad Company would otherwise be entitled as a Railroad operating in the Midwest or East shall be subject to further order of this Court.

8. The Interlocutory Injunction ordered by this Court shall provide that if the aforesaid Order of the Commission dated March 21, 1963, as amended by the Order dated June 20, 1963, is not permanently enjoined, set aside, annulled or

suspended as to any part or parts thereof in this action by this Court, then the provisions of Paragraph 7 of these Conclusions of Law shall be applicable as between the applicants for the Interlocutory Injunction and any railroad subject to the Commission's Order, but only to the extent that any such applicant or railroad is affected by such part or parts of said Order as are not so permanently enjoined, set aside, annulled or suspended by this Court.

9. The Interlocutory Injunction ordered by this Court shall provide that nothing in said Injunction shall preclude any party from making application to this Court at any time for such modification of said Injunction as may be required in the light of any change in conditions or other good cause shown.

[fol. 1380] 10. The Interlocutory Injunction ordered by this Court shall provide that this Court reserves jurisdiction of the within matter for all purposes to make any and all further proper orders in the circumstances.

11. The Interlocutory Injunction ordered by this Court shall take effect upon the filing by plaintiffs herein of a bond in the sum of $50,000 as security for the payment of such costs and damages as may be incurred or suffered by any party as provided in Rule 65(c) of the Federal Rules of Civil Procedure.

12. The foregoing Findings of Fact and Conclusions of Law relate to the applications for an Interlocutory Injunction and shall not be binding upon this Court in its consideration of this action on the merits.

Dated: Aug. 3, 1963.

Stanley N. Barnes, United States Circuit Judge,
Wm. C. Mathes, United States District Judge,
E. Avery Crary, United States District Judge.

[fol. 1381]
[Stamp—Filed Aug 5 1963—Clerk, U.S. District Court—Southern District of California—By (Illegible), Deputy]
[Stamp—Entered—Aug 6 1963—Clerk, U. S. District Court—Southern District of California—By (Illegible), Deputy]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 63-745-EC

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., Plaintiffs,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

JUDGMENT FOR INTERLOCUTORY INJUNCTION—August 3, 1963

The Court, having made its Findings of Fact and Conclusions of Law upon the applications for an Interlocutory Injunction,

It Is Hereby Ordered:

1. That the enforcement, operation and execution of the Order of the Interstate Commerce Commission dated March 21, 1963, as amended by the Order of that Commission dated June 20, 1963, in the proceedings before that Commission in its Docket No. 31503 and Sub. Nos., which Order became effective by its terms on and after July 1, 1963, is hereby enjoined, restrained and suspended pending the final hearing and determination of this action in this court, or until further order of this court.

2. The foregoing Order of this Court is subject to the following conditions:

[fol. 1381a] (a) The conditions shall be binding upon the following parties hereto, all of whom have applied for the foregoing Interlocutory Injunction and who will hereinafter be referred to as "Applicants for the Interlocutory Injunction":

Plaintiffs The Atchison, Topeka and Santa Fe Railway Company, The Denver and Rio Grande Western Railroad Company, Great Northern Railway Company, Los Angeles Junction Railway Company, Northern Pacific Railway Company, Santa Maria Valley Railway Company, Southern Pacific Company, Trona Railway Company, Union Pacific Railroad Company, Ventura County Railway Company and The Western Pacific Railroad Company.

Intervening plaintiffs Amador Central Railroad Company, The Arcata and Mad River Rail Road Company, Butte, Anaconda & Pacific Railway Company, California Western Railroad, Camas Prairie Railroad Company, Camino, Placerville & Lake Tahoe Railroad Company, Central California Traction Company, the Colorado and Wyoming Railway Company, Gulf, Colorado and Santa Fe Railway Company, Holton Inter-Urban Railway Company, Inter-California Railway Company, Klamath Northern Railway Company, Longview, Portland & Northern Railway Company, Magma Arizona Railroad Company, McCloud River Railroad Company, Modesto and Empire Traction Company, Nacozari Rail Road Company, Nevada Northern Railway Company, Northwestern Pacific Railroad Company, Oregon, California & Eastern Railway Company, Oregon Electric Railway Company, Oregon Pacific and Eastern Railway Company, Oregon Trunk Railway, Pacific Coast R.R. Co., Pacific Electric Railway Com-
[fol. 1382] pany, Panhandle and Santa Fe Railway Company, Petaluma and Santa Rosa Railroad Company, Portland Traction Company, Sacramento Northern Railway, Salt Lake, Garfield and Western Railway

Company, San Diego & Arizona Eastern Railway Company, Sierra Railroad Company, Spokane International Railroad Company, Spokane, Portland and Seattle Railway Company, Stockton Terminal and Eastern Railroad, Sunset Railway Company, Tidewater Southern Railway Company, Tijuana and Tecate Railway Company, Tooele Valley Railway Company, Tucson, Cornelia and Gila Bend Railroad Company, Utah Railway Company, Visalia Electric Railroad Company, Walla Walla Valley Railway Company, Yakima Valley Transportation Co., and Yreka Western Railroad Company.

Intervening plaintiff St. Iouis-San Francisco Railway Company.

(b) If the aforesaid Order of the Interstate Commerce Commission dated March 21, 1963, as amended by the Order dated June 20, 1963, is not permanently enjoined, set aside, annulled or suspended by this Court upon final hearing and determination of this action:

(i) The Order of the Interstate Commerce Commission dated March 21, 1963, as amended June 20, 1963, is deemed to be effective for all purposes as of and from July 1, 1963.

(ii) Where the divisions presently in effect on transcontinental freight shipments produce revenues for any railroad subject to the Commission's Order which are in excess of the revenues that would have [fol. 1383] been produced by the new divisions prescribed by the Commission, such net differences constitute an indebtedness of each such railroad. Each of the applicants for the Interlocutory Injunction shall resettle with all railroads covered by the Commission's Order, whether or not parties to this action, on the basis of the divisions prescribed by the Commission in its aforesaid Order. In addition to any other right of set off, any such indebtedness may be

set off by the creditor railroad against any balance it may have on hand which would otherwise be payable to the debtor carrier on account of interline settlements.

(iii) To compensate for damages that any railroad would incur as a result of the issuance of this Interlocutory Injunction because of the loss of the use of money, each applicant for the Interlocutory Injunction shall pay interest from the accounting monthly settlement dates prescribed by the Railway Accounting Rules at a rate or rates to be fixed by the Court at the time of the determination of such indebtedness of each such applicant, and this Court reserves jurisdiction to determine said rate or rates and the total amount of said interest and to order its payment.

(iv) Applicants for the Interlocutory Injunction shall reimburse all intervening defendants for additional accounting expenses, if any, and any other damages incurred as a result of this Interlocutory [fol. 1384] Injunction.

(v) In the event the Chicago, Milwaukee, St. Paul & Pacific Railroad Company should refuse to resettle with interest the divisions in which it participates as a railroad operating in Mountain-Pacific territory, payment by Applicants for the Interlocutory Injunction of the debts and damages to which the Chicago, Milwaukee, St. Paul & Pacific Railroad Company would otherwise be entitled as a railroad operating in the Midwest or East shall be subject to further order of this Court.

3. If the aforesaid Order of the Commission dated March 21, 1963, as amended by the Order dated June 20, 1963, is not permanently enjoined, set aside, annulled or suspended as to any part or parts thereof in this action by this Court, then the provisions of paragraph 2 shall be applicable as

between the Applicants for the Interlocutory Injunction and any railroad subject to the Commission's Order, but only to the extent that any such Applicant or railroad is affected by such part or parts of said Order as are not so permanently enjoined, set aside, annulled or suspended by this Court.

4. Nothing in this Order shall preclude any party from making application to this Court at any time for such modification of this Order as may be required in light of any change in conditions or other good cause shown.

5. This Court reserves jurisdiction of the within matter for all purposes to make any and all further proper orders in the circumstances.

6. This judgment for Interlocutory Injunction shall take effect upon the filing by plaintiffs herein of a bond in the [fol. 1385] sum of $50,000.00 as security for the payment of such costs and damages as may be incurred or suffered by any party as provided in Rule 65c, Fed. R. Civ. P.

Dated: August 3, 1963

Stanley N. Barnes, United States Circuit Judge,
Wm. C. Mathes, United States District Judge,
E. Avery Crary, United States District Judge.

[fol. 1386]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

ANSWER OF INTERVENING DEFENDANT, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, TO COMPLAINT IN INTERVENTION OF AMADOR CENTRAL RAILROAD COMPANY, ET AL.—Filed August 12, 1963

Chicago, Milwaukee, St. Paul and Pacific Railroad Company, an intervening defendant, in answer to the complaint in intervention of Amador Central Railroad Company, et al., states:

I.

Defendant admits the allegations of Paragraph 1 of the complaint in intervention.

II.

Defendant hereby adopts and incorporates herein by reference, as though fully rewritten, Paragraphs 1 through 6 of its answer to the complaint of plaintiffs in this action, in answer to Paragraph 2 of the complaint in intervention.

[fol. 1387] WHEREFORE, intervening defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, prays that the relief prayed for in the complaint in intervention, or any relief whatsoever, be denied, and that the complaint in intervention be dismissed.

Dated August 12, 1963.

Raymond K. Merrill, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 888 Union Station —516 W. Jackson Blvd., Chicago 6, Illinois;

[File endorsement omitted]

Welsh & Cummins, 1204 Statler Center—900 Wilshire Blvd., Los Angeles 17, California, Telephone No. MAdison 4-3431, Louis M. Welsh;

Attorneys for Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

[fol. 1388] Affidavit of Service (omitted in printing).

[fol. 1390]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

ANSWER OF INTERVENING DEFENDANT, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, TO INTERVENING COMPLAINT OF THE PEOPLE OF THE STATE OF CALIFORNIA ET AL.—Filed August 12, 1963

Chicago, Milwaukee, St. Paul and Pacific Railroad Company, intervening defendant, in answer to the intervening complaint of the People of the State of California, et al., states:

I.

Defendant admits the allegations of Paragraphs 1, 2 and 3 of the intervening complaint.

II.

Defendant admits the allegations of Paragraph 4 of the intervening complaint, except the characterization therein of the increases in divisions sought by the Midwestern Rail-

[File endorsement omitted]

roads as "drastic", and respectfully refers the Court to the record before the Commission with respect to the increases sought.

[fol. 1391]

III.

Answering the allegations of Paragraph 5 of the intervening complaint, defendant admits that the Mountain Pacific Lines are dependent, but only in part, upon their divisions from Mountain Pacific traffic for revenues necessary to fulfill their service obligations. Defendant respectfully refers the court to Section 15 (6) of the Interstate Commerce Act (Title 49, U.S.C., Section 15 (6)) for a correct statement of the factors which the Interstate Commerce Commission must take into consideration in prescribing divisions.

IV.

Defendant denies the first sentence of Paragraph 6 of the intervening complaint, but admits the second sentence thereof.

V.

Defendant denies the allegations of Paragraphs 7 through 10 of the intervening complaint.

VI.

Defendant admits the first two sentences of Paragraph 11, but denies the presumptions in the third and fourth sentences of Paragraph 11 of the intervening complaint that any harm will result to the public by the change in divisions prescribed by the March 21, 1963 order insofar as increased divisions were granted the Midwestern Railroads.

VII.

Defendant denies the allegations in Paragraph 12 of the intervening complaint that the new bases of divisions ac-

corded the Midwestern Railroads would cause immediate and irreparable injury to the People of the State of [fol. 1392] California; that the March 21, 1963 order rests upon the premise that the Mountain Pacific Lines' divisions should be decreased because of their excessive passenger deficit; that the order constitutes an unlawful inducement or compulsion upon the Mountain Pacific Lines drastically to curtail their passenger operations; or that it threatens a continuation of services vital to the People of the State of California.

WHEREFORE, intervening defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, prays that the relief prayed for in the intervening complaint of the People of the State of California et al., or any relief whatsoever, be denied, and that the complaints be dismissed.

Dated August 12, 1963.

Raymond K. Merrill, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 888 Union Station—516 W. Jackson Blvd., Chicago 6, Illinois;

Welsh & Cummins, 1204 Statler Center—900 Wilshire Blvd., Los Angeles 17, California; Telephone No. MAdison 4-3431, Louis M. Welsh;

Attorneys for Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

[fol. 1393] Affidavit of Service (omitted in printing).

[fol. 1395]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

NOTICE OF ENTRY OF JUDGMENT FOR INTERLOCUTORY INJUNCTION—Filed August 13, 1963

To Defendants and Interveners and each of them:

Please Take Notice as Follows:

1. The Findings of Fact and Conclusions of Law of the above entitled Court upon the applications for an interlocutory injunction in the above entitled action were filed on August 5, 1963 and entered on August 6, 1963.

[fol. 1396] 2. The Judgment of the above entitled Court for Interlocutory Injunction, a copy of which is attached hereto, was filed on August 5, 1963 and entered on August 6, 1963.

3. The Undertaking on Interlocutory Injunction in the sum of Fifty Thousand Dollars ($50,000) as security for the payment of such costs and damages as may be incurred or suffered by any party as provided in Rule 65(c), Federal Rules of Civil Procedure, was approved by the above entitled Court on August 3, 1963 and was filed on August 5, 1963.

Dated: August 12, 1963.

O'Melveny & Myers, Homer I. Mitchell, Warren M. Christopher, Donald M. Wessling;

[File endorsement omitted]

Sidley, Austin, Burgess & Smith, Douglas F. Smith, Howard J. Trienens, George L. Saunders, Jr., Homer I. Mitchell;

Attorneys for Plaintiffs.

[fol. 1397]
CLERK'S NOTE:

Attachment—"Judgment For Interlocutory Injunction" is omitted from the record here as it appears on side folio 1381 supra.

[fol. 1403] Affidavit of Service (omitted in printing).

[fol. 1406]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

DEFENDANTS' ANSWER TO COMPLAINT IN INTERVENTION OF ARIZONA CORPORATION COMMISSION, ET AL.—Filed August 28, 1963

The United States of America and the Interstate Commerce Commission, defendants herein, in answer to the complaint in intervention of Arizona Corporation Commission, et al., plead as follows:

I.

Admit the allegations contained in paragraphs I and II of said complaint in intervention.

[File endorsement omitted]

II.

Answering the allegations contained in paragraph III, admit the allegations contained therein, except deny that Arizona Corporation Commission was a party to the [fol. 1407] proceedings before the Commission at any time prior to June 21, 1963.

III.

Answering the allegations contained in paragraph IV, which adopts by reference plaintiffs' complaint, defendants refer to and incorporate herein as though fully rewritten, paragraphs I through XIII of the answer of defendants to plaintiffs' complaint.

IV.

Deny each and every allegation contained in paragraph V, except admit that the Commission under section 15(6) is required to give due consideration to "the importance to the public of the transportation services of such carriers."

V.

Deny each and every allegation contained in paragraphs VI-XI, inclusive.

VII.

For further answer to the allegations contained in the complaint, defendants deny that the orders of the Commission challenged herein are unlawful for the reasons specified or for any other reason whatsoever, and allege that said orders are fully supported and justified by the findings and the evidence and are valid in all respects. Except as expressly admitted herein, each and every allegation of the complaint is denied.

Wherefore, defendants pray that the relief sought in the complaint be denied, and that the complaint be dismissed.

[fol. 1408] William H. Orrick, Jr., Assistant Attorney General;

Francis C. Whelan, United States Attorney, Los Angeles, California;

John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C.;

Attorneys for the United States of America.

Robert W. Ginnane, General Counsel;

Stanton P. Sender, Attorney, Interstate Commerce Commission, Washington 25, D. C.;

Attorneys for the Interstate Commerce Commission.

Certificate of Service (omitted in printing).

[fol. 1409]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

DEFENDANTS' ANSWER TO COMPLAINT IN INTERVENTION OF AMADOR CENTRAL RAILROAD COMPANY, ET AL.--Filed August 28, 1963

The United States of America and the Interstate Commerce Commission, defendants herein, in answer to the complaint in intervention of Amador Central Railroad Company, et al., plead as follows:

[File endorsement omitted]

I.

Admit the allegations contained in paragraph I of said complaint in intervention.

II.

Answering the allegations contained in paragraph II, which adopts and incorporates by reference, paragraph I and paragraphs III through XX, inclusive, of the plaintiffs' complaint, defendants refer to and incorporate herein [fol. 1410] as though fully rewritten, paragraphs I through XIII of the answer of defendants to the plaintiffs' complaint.

III.

For further answer to the allegations contained in the complaint, defendants deny that the orders of the Commission challenged herein are unlawful for the reasons specified or for any other reason whatsoever, and allege that said orders are fully supported and justified by the findings and the evidence and are valid in all respects. Except as expressly admitted herein, each and every allegation of the complaint is denied.

Wherefore, defendants pray that the relief sought in the complaint be denied, and that the complaint be dismissed.

William H. Orrick, Jr., Assistant Attorney General;

Francis C. Whelan, United States Attorney, Los Angeles, California;

John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C.;

Attorneys for the United States of America.

Robert W. Ginnane, General Counsel;

Stanton P. Sender, Attorney, Interstate Commerce Commission, Washington 25, D. C.;

Attorneys for the Interstate Commerce Commission.

Certificate of Service (omitted in printing).

[fol. 1411]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

JOINT ANSWER OF THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION—Filed August 28, 1963

The United States of America and the Interstate Commerce Commission, defendants herein, in answer to the complaint, plead as follows:

I.

Admit the allegations contained in paragraphs I-V, inclusive.

II.

Answering the allegations contained in paragraph VI, deny that the controversy is as alleged in the first sentence of paragraph VI, and aver that the issue before this Court is whether or not the Commission's determination lies within its statutory authority, and is based upon adequate [fol. 1412] findings supported by substantial evidence. Admit generally the territorial descriptions contained in the second, third, and fourth sentences of paragraph VI.

[File endorsement omitted]

III.

Answering the allegations contained in paragraph VII, admit the first, second, and third sentences of paragraph VII. As to the fourth sentence of paragraph VII, admit that the quoted portion is from section 1(4) of the Act, and that a number of rates, charges, and classifications have been established between the participating railroads with respect to transcontinental traffic, but deny the remaining allegations contained in the fourth sentence of paragraph VII.

IV.

Answering the allegations contained in paragraph VIII, admit that the quoted portion contained in the first sentence of paragraph VIII is from section 1(4) of the Act, but deny that the agreed basis of divisions are, or for a number of years have been, just, reasonable, and equitable, and aver that just, reasonable, and equitable divisions are those set forth in the Commission's report and order of March 21, 1963.

V.

Answering the allegations contained in paragraph IX, admit the allegations contained therein to the extent they are in accord with the statements and findings of the Commission, set forth at pages 2-6 of its report of March 21, 1963, which is attached to the complaint as Exhibit A, describing the parties, issues and pleadings in the proceedings before the Commission, and otherwise deny the allegations contained in paragraph IX.

VI.

Admit the allegations contained in paragraph X.

[fol. 1413] VII.

Answering the allegations contained in paragraph XI, admit the first sentence of paragraph XI. Deny the re-

maining allegations contained in paragraph XI, except to the extent they are in accord with the report and order of the Commission of March 21, 1963; and respectfully refer the Court to the report and order of the Commission, attached to the complaint as Exhibits A and B, for a complete and accurate statement of the findings and conclusions of the Commission.

VIII.

Admit the allegations contained in paragraph XII.

IX.

Answering the allegations contained in paragraph XIII, admit the allegation contained in the first, third and fifth sentences of paragraph XIII. Deny the allegations contained in the second and fourth sentences, except admit that the Commission entered its order dated April 12, 1963, a copy of which is attached to the complaint as Exhibit C, and its order dated June 20, 1963 (rather than June 24, 1963), a copy of which is attached to the complaint as Exhibit D, and respectfully refer the Court to said orders for a complete and accurate statement of their contents.

X.

Answering the allegations contained in paragraph XIV, deny the allegations contained therein, except admit that the Commission's order of March 21, 1963 is a final order for purposes of judicial review, and that this action is brought to review that order.

XI.

Deny the allegations contained in paragraphs XV-XVIII, inclusive.

[fol. 1414] XII.

Deny each and every allegation contained in paragraph XIX, except admit that the Commission received advice

and assistance from members of its staff not engaged in the performance of investigative or prosecuting functions.

XIII.

Deny the allegations contained in paragraph XX.

XIV.

For further answer to the allegations contained in the complaint, defendants deny that the orders of the Commission challenged herein are unlawful for the reasons specified or for any other reason whatsoever, and allege that said orders are fully supported and justified by the findings and the evidence and are valid in all respects. Except as expressly admitted herein, each and every allegation of the complaint is denied.

Wherefore, defendants pray that the relief sought in the complaint is denied, and that the complaint be dismissed.

William H. Orrick, Jr., Assistant Attorney General.

Francis C. Whelan, United States Attorney, Los Angeles, California, Attorneys for the United States of America.

John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C.

Robert W. Ginnane, General Counsel.

Stanton P. Sender, Attorney, Interstate Commerce Commission, Washington 25, D. C., Attorneys for the Interstate Commerce Commission.

[fol. 1415] Certificate of Service (omitted in printing).

[fol. 1416]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

DEFENDANTS' ANSWER TO COMPLAINT IN INTERVENTION OF ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY—Filed August 28, 1963

The United States of America and the Interstate Commerce Commission, defendants herein, in answer to the complaint in intervention of St. Louis-San Francisco Railway Company, plead as follows:

I.

Admit the allegations contained in paragraphs I and II.

II.

Answering the allegations contained in paragraph III, which adopts by reference paragraphs III, IV, V, VI, VII and VIII of the plaintiffs' complaint, defendants refer to and incorporate herein as though fully rewritten, paragraphs I, II, III and IV of the answer of defendants to plaintiffs' complaint.

[fol. 1417]

III.

Answering the allegations contained in paragraph IV, which adopts by reference paragraph IX of plaintiffs' complaint, and states an additional allegation thereto, defendants refer to and incorporate as though fully rewritten, paragraph V of the answer of defendants to plaintiffs' complaint; and admit that the intervening plaintiff was

[File endorsement omitted]

one of the "Midwestern lines" which filed a separate complaint docketed by the Commission as No. 31503 (Sub. No. 1).

IV.

Answering the allegations contained in paragraph V, which adopts by reference paragraphs X, XI and XII, including the exhibits referred to in said paragraphs of plaintiffs' complaint, defendants refer to and incorporate as though fully rewritten, paragraphs VI, VII and VIII of the answer of defendants to plaintiffs' complaint.

V.

Answering the allegations contained in paragraph VI, insofar as it adopts by reference the allegations of paragraph XIII of plaintiffs' complaint, defendants refer to and incorporate as though fully rewritten, paragraph IX of the answer of defendants to plaintiffs' complaint; and admit the remaining allegations contained in paragraph VI.

VI.

Answering the allegations contained in paragraph VII, which adopts by reference paragraph XIV of plaintiffs' complaint, defendants refer to and incorporate herein as though fully rewritten, paragraph X of the answer of defendants to plaintiffs' complaint.

VII.

Deny the allegations contained in paragraphs VIII and IX, inclusive.

[fol. 1418] VIII.

For further answer to the allegations contained in the complaint, defendants deny that the orders of the Commission challenged herein are unlawful for the reasons specified or for any other reason whatsoever, and allege

that said orders are fully supported and justified by the findings and the evidence and are valid in all respects. Except as expressly admitted herein, each and every allegation of the complaint is denied.

Wherefore, defendants pray that the relief sought in the complaint be denied, and that the complaint be dismissed.

William H. Orrick, Jr., Assistant Attorney General.

Francis C. Whelan, United States Attorney, Los Angeles, California.

John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C., Attorneys for the United States of America.

Robert W. Ginnane, General Counsel.

Stanton P. Sender, Attorney, Interstate Commerce Commission, Washington 25, D. C., Attorneys for the Interstate Commerce Commission.

Certificate of Service (omitted in printing).

[fol. 1419]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

DEFENDANTS' ANSWER TO COMPLAINT IN INTERVENTION OF THE PEOPLE OF THE STATE OF CALIFORNIA, ET AL.—Filed August 28, 1963

The United States of America and the Interstate Commerce Commission, defendants herein, in answer to the

[File endorsement omitted]

complaint in intervention of the People of the State of California, et al., plead as follows:

I.

Admit the allegations contained in paragraphs 1-3, inclusive.

II.

Answering the allegations contained in paragraph 4, deny that the controversy is as alleged in the first sentence of paragraph 4, and aver that the issue before this Court is whether or not the Commission's determination lies [fol. 1420] within its statutory authority, and is based upon adequate findings supported by substantial evidence. Admit generally the territorial descriptions contained in the second, third and fourth sentences of paragraph 4. Admit the allegations contained in the fifth sentence of paragraph 4, except deny the characterization of the increases in divisions sought as "drastic."

III.

Deny the allegations contained in paragraph 5, except admit that the Commission under section 15(6) is required to give due consideration to "the importance to the public of the transportation services of such carriers."

IV.

Answering the allegations contained in paragraph 6, deny the allegations contained therein, except admit that the order of the Commission, dated March 21, 1963, and served upon the parties on March 28, 1963, increases the divisions of both the Eastern and Midwestern lines.

V.

Deny the allegations contained in paragraphs 7-10, inclusive.

VI.

Answering the allegations contained in paragraph 11, admit the first and second sentences of paragraph 11; and, deny the allegations contained in the third and fourth sentences of paragraph 11, except admit that the March 21, 1963 order of the Commission is a final order for purposes of judicial review.

VII.

Deny the allegations contained in paragraph 12.

[fol. 1421] VIII.

For further answer to the allegations contained in the complaint, defendants deny that the orders of the Commission challenged herein are unlawful for the reasons specified or for any other reason whatsoever, and allege that said orders are fully supported and justified by the findings and the evidence and are valid in all respects. Except as expressly admitted herein, each and every allegation of the complaint is denied.

Wherefore, defendants pray that the relief sought in the complaint be denied, and that the complaint be dismissed.

William H. Orrick, Jr., Assistant Attorney General.

Francis C. Whelan, United States Attorney, Los Angeles, California.

John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C., Attorneys for the United States of America.

Robert W. Ginnane, General Counsel.

Stanton P. Sender, Attorney, Interstate Commerce Commission, Washington 25, D. C., Attorneys for the Interstate Commerce Commission.

Certificate of Service (omitted in printing).

[fol. 1422]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

AMENDED COMPLAINT TO ENJOIN, SET ASIDE, ANNUL AND SUSPEND ORDER OF THE INTERSTATE COMMERCE COMMISSION—Filed March 20, 1964

Intervening plaintiff, St. Louis-San Francisco Railway Company, by its attorneys, for amended statement of its claim against defendants, respectfully alleges:

I

In the complaint filed in this Court on June 25, 1963, plaintiff sought a temporary restraining order, an interlocutory injunction and a permanent injunction against an order of the Interstate Commerce Commission issued on March 21, 1963 (served March 28, 1963), and amended on June 20, 1963 (served June 24, 1963), in its Docket No. 31503, as more fully identified in Paragraph 1 of that complaint. On June 27, 1963, the temporary restraining order was granted by the District Judge to whom the case was assigned, and, on August 3, 1963, the interlocutory injunction was granted by order of the full statutory court, as required by Section 2284 of Title 28, United States Code. Because proceedings were still pending before the Commission in connection with petitions for reconsideration, re-[fol. 1423] argument and further hearing on the March 21, 1963 order, plaintiffs and intervening plaintiff St. Louis-San Francisco Railway Company did not then request a hearing on their prayer for a permanent injunction.

[File endorsement omitted]

II

On January 22, 1964, the Commission served its supplemental report and order in Docket No. 31503, dated December 31, 1963, in which it undertook to deal with and dispose of all petitions pending before it. The effect of this supplemental report and order, copies of which are attached to the supplemental complaint of plaintiffs and intervening plaintiffs Amador Central Railroad Company, et al. and marked Exhibits A and B thereto, respectively, was, except for minor technical changes made in the mechanics of its original order, to deny all requests for reconsideration and modification of the Commission's previous action. The supplemental order is essentially identical to the original order of March 21, 1963, and for the most part, the grounds set forth to justify that order in the supplemental report are essentially the same as those relied upon in the original report. On February 7, 1964 the Commission served a notice to the parties in said docket number, dated February 4, 1964, making certain corrections of a minor nature in the Supplemental Report and Order of December 31, 1963. A copy of said notice to the parties is attached to said Supplemental Complaint as Exhibit C.

III

The Commission's supplemental report and order are unlawful for the same reasons and upon the same grounds as the original reports and orders of March 21, 1963, as amended on June 20, 1963, which reasons and grounds are specifically described in Paragraph III through VIII, X through XII, XIV, XVI, XVIII and XIX of the complaint. Each of these paragraphs is incorporated herein and adopted by intervening plaintiff as also applicable to the supplemental report and order of December 31, 1963.

[fol. 1424]

IV

To the extent that the Commission's supplemental report injects any new factual grounds into its reasoning in support of its orders, such grounds are not supported by adequate or substantial evidence, but rest upon assumptions of fact directly contrary to the uncontroverted evidence.

V

In making amendments to the March 21, 1963 order by its order of June 20, 1963, the Commission failed to provide for the 30-day notice period required by Section 15(2) of the Interstate Commerce Act, and the plaintiffs contend that the amendments to the March 21, 1963 order are unlawful on that ground. Although the Commission disagreed with this contention when confronted with it on reconsideration, it nonetheless saw fit to set forth in its supplemental order all of the provisions of the March 21, 1963 order, as amended by the order of June 20, 1963, with a new effective date of March 30, 1964, thus providing for the 30-day notice period required. In addition, the supplemental order provides that the minor technical changes found necessary in the supplemental report should become effective on or before March 30, 1964.

VI

The interlocutory injunction now in effect with respect to the March 21, 1963 order, as amended by the order of June 20, 1963, should be amended also to apply to the Commission's order of December 31, 1963. The grounds justifying the original interlocutory injunction, as set forth in the Court's findings of fact and conclusions of law upon which that injunction is based, are equally applicable to the order of December 31, 1963.

VII

Intervening plaintiff adopts by reference paragraph IX of the complaint of plaintiffs filed in this cause but states in addition thereto that intervening plaintiff is one of the [fol. 1425] "midwestern lines" which filed a separate complaint docketed by the Interstate Commerce Commission as No. 31503 (Sub No. 1) referred to in said paragraph IX.

VIII

Intervening plaintiff adopts the allegations of paragraph XIII of the complaint filed by plaintiffs in this cause with respect to dates upon which said plaintiff filed its request with the Commission for the extension of the period for filing petitions for re-argument and reconsideration by the Interstate Commerce Commission of its order dated March 21, 1963, and further alleges that on May 16, 1963, intervening plaintiff, in replying to the petition for modification of effective date filed with the Interstate Commerce Commission on April 26, 1963, indicated that it desired to join in seeking the postponement of the effective date of the order of the Interstate Commerce Commission dated March 21, 1963. By the order of the Interstate Commerce Commission dated June 20, 1963, a copy of which was attached to the complaint of the St. Louis-San Francisco Railway Company in this cause as Exhibit D, the Interstate Commerce Commission denied the petition of intervening plaintiff for postponement of the effective date of the order of the Interstate Commerce Commission dated March 21, 1963.

IX

The order of the Interstate Commerce Commission dated March 21, 1963, to make effective on and after July 1, 1963, new bases of divisions on transcontinental traffic is, as it applies to the intervening plaintiff, unlawful and in violation of the Interstate Commerce Act (49 U.S.C. § 1 *et seq.*) the Administrative Procedure Act (5 U.S.C. § 1001 *et seq.*), and the Due Process Clause of the Federal Constitution (Amend. V) for the following reasons:

(1) The Commission's order as it applies to intervening plaintiff is not supported by adequate or substantial evi- [fol. 1426] dence and is contrary to the evidence.

(2) The Commission's order is unlawful because it drastically reduces the divisional revenues of intervening plaintiff without making any finding with respect to the amount of annual revenues of the intervening plaintiff which the order would transfer from intervening plaintiff to other carriers without containing any finding that such a transfer is necessary to meet any specified proportion of the revenue needs of the carriers that would receive the increased divisions, and without any finding that such a transfer will not unduly impair intervening plaintiff's ability to meet its needs for revenues.

(s) The action of the Commission in failing to postpone the effective date of its order until after all proceedings before it were completed was arbitrary and capricious and constitutes a failure by the Commission to accord intervening plaintiff the full hearing to which it is entitled under the Interstate Commerce Act, the Administrative Procedure Act and the Due Process Clause of the Fifth Amendment of the Federal Constitution.

X

The Commission had before it and relied upon estimates outside the record as to the amount of revenue the prescribed divisions would shift from intervening plaintiff's lines to Eastern and Transcontinental lines and failed to disclose those estimates or the source from which they were derived.

XI

The Commission committed error when it denied the petition of intervening plaintiff for modification and reconsideration of the findings, report and order of March 21, 1963, as amended. The petition of intervening plaintiff is attached hereto marked Exhibit A.

XII

The Commission threatens to enforce its order decided [fol. 1427] December 31, 1963 (served January 22, 1964) which under its terms is to become effective March 30, 1964. The Commission's order just referred to further requires that the new basis of divisions be applied on and after July 1, 1963, and the said order will, if enforced, cause immediate and irreparable injury to intervening plaintiff. As specific grounds for continuing the interlocutory injunction issued by this Court on August 12, 1963, in full force and effect and for the granting of a permanent injunction in this proceeding pending the final hearing and determination of this action in this Court, or until further order of this Court, intervening plaintiff alleges, in addition to the facts hereinbefore set forth, the following:

(1) If intervening plaintiff refuses to comply with said supplemental order, such refusal will constitute a violation of Section 16(8) of the Interstate Commerce Act, and such refusal may subject the intervening plaintiff to statutory penalties of $5,000 for each offense, each day of such refusal being deemed a separate offense, and such refusal will expose intervening plaintiff to an action by the United States for the recovery of such penalties;

(2) If intervening plaintiff is required to comply with said order, it will suffer immediate and substantial loss of revenues which it now receives as its share of the revenues from transcontinental traffic;

(3) Intervening plaintiff is without any administrative remedy inasmuch as few of the transcontinental shipments move on rates which were "established pursuant to a finding and order of the Commission" within the meaning of Section 15(6) of the Interstate Commerce Act and are thus not subject to the Commission's power to require retroactive adjustment of divisions;

(4) Intervening plaintiff alleges that by reason of [fol. 1428] all of the foregoing it is without any plan or adequate remedy at law as a multiplicity of actions would be required to recover divisions under present agreements with the Transcontinental and Eastern carriers;

(5) If intervening plaintiff is required to comply with said order, it would be required to make a double changeover in its accounting system and duplicate accounting would be necessitated thereby; first, by being required to change the method of dividing transcontinental revenues to the bases prescribed by said order; and, second, by changing back to the present basis of divisions if said order is permanently enjoined as prayed in this cause. Each change in accounting methods requires a reorganization of accounting procedures, thus causing a substantial disruption in intervening plaintiff's normal accounting operations and the needless expenditure of large sums of money;

(6) No injury will be sustained by defendants or by the public through the continuance by this Court of its interlocutory injunction issued on August 12, 1963, in full force and effect or by the granting of a permanent injunction pending the final hearing and determination of this action in this Court, or until further action by this Court.

Wherefore, intervening plaintiff prays:

1. That the interlocutory injunction of August 3, 1963, be amended so that the operation, enforcement and execution of the orders of March 21, 1963 (served March 28, 1963), amended on June 20, 1963 (served June 24, 1963) and December 31, 1963, including the Commission's notice to the parties dated February 4, 1964 (served February 7, 1964) making extra corrections of a minor nature in the supplemental report and order of December 31, 1963, be

[fol. 1429] enjoined pending the final hearing and determination of this action.

2. That the operation, enforcement and execution of the orders of March 21, 1963 (served March 28, 1963), amended on June 20, 1963 (served June 24, 1963) and December 31, 1963, including the Commission's notice to the parties dated February 4, 1964 (served February 7, 1964) making extra corrections of a minor nature in the supplemental report and order of December 31, 1963, be perpetually enjoined and permanently set aside, annulled and suspended.

3. That intervening plaintiff recover its proper costs.

4. That intervening plaintiff have such other and further relief in the premises as in equity may be deemed meet and just by this Honorable Court.

Ernest D. Grinnell, Jr., John E. McCullough, Dean C. Dunlavey, Gibson, Dunn & Crutcher, By Dean C. Dunlavey, Attorneys for Intervening Plaintiff.

[fol. 1430]

EXHIBIT A TO AMENDED COMPLAINT

BEFORE THE

INTERSTATE COMMERCE COMMISSION

No. 31,503*

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, et al., Complainants,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., Defendants.

PETITION OF MISSOURI-KANSAS-TEXAS RAILROAD COMPANY** AND ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY*** FOR MODIFICATION AND RECONSIDERATION OF FINDINGS, REPORT AND ORDER OF MARCH 21, 1963, AS AMENDED

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,

WILLIAM A. THIE,
MONROE E. CLINTON,
ERNEST D. GRINNELL, JR.,
JOHN E. McCULLOUGH,
Their Attorneys.

Due Date: July 26, 1963.

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* This petition also embraces The Ahnapee and Western Ry. Co. et al. v. Abilene & Southern Ry. Co. et al., Sub-No. 1; Chicago, Burlington & Quincy R. R. Co. et al. v. Abilene & Southern Ry. Co. et al., Sub-No. 2; Chicago, Milwaukee, St. Paul and Pacific R. R. Co. v. Abilene & Southern Ry. Co. et al., Sub-No. 3; Louisville and Nashville R. R. Co. v. The Akron, Canton & Youngstown R. R. Co. et al., Sub-No. 4; and The Cincinnati, New Orleans and Texas Pacific Ry. Co. et al. v. The Akron, Canton & Youngstown R. R. Co. et al., Sub-No. 5.

Additional references on next page.

[fol. 1431]

BEFORE THE

INTERSTATE COMMERCE COMMISSION

No. 31,503

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, et al., Complainants,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., Defendants.

PETITION OF MISSOURI-KANSAS-TEXAS RAILROAD COMPANY AND ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY FOR MODIFICATION AND RECONSIDERATION OF FINDINGS, REPORT AND ORDER OF MARCH 21, 1963, AS AMENDED

Come now the Missouri-Kansas-Texas Railroad Company** and the St. Louis-San Francisco Railway Company*** (hereinafter referred to as the "Katy" and the "Frisco") and petition the Commission for modification and reconsideration of the Findings, Report and Order of the Commission dated March 21, 1963, as amended by its Order of June 20, 1963.

The Katy and the Frisco, as members of the Midwest Group, have joined in a petition which is being filed simultaneously herewith, requesting modification and reconsideration of the Commission's Report and Order dated March 21, 1963, as amended. In the footnote on the bottom of page 2 of the Midwest Group's Petition, it is stated that:

** This petition includes the Beaver, Meade and Englewood Railroad Company, a wholly owned subsidiary of the Katy.

*** This petition also includes the Quanah, Acme & Pacific Railway Company, and St. Louis, San Francisco and Texas Railway Company, wholly owned subsidiaries of the Frisco.

"The Missouri-Kansas-Texas and the St. Louis-San Francisco are filing a separate petition. They concur in this petition except as to those matters on which [fol. 1432] a different position is taken or a different view expressed in their separate petition."

This petition is filed in order to make known the position of the Katy and Frisco on those matters in which they differ from certain positions taken by the Midwestern Group; and to adequately cover the inequities peculiar to the Katy and Frisco, so that the Commission can eliminate or at least modify their tremendous losses brought about by the Commission's orders.

The Katy and Frisco are filing a Petition for leave to file a Petition for Rehearing and Further Hearing. Appended thereto is the Petition for Rehearing and Further Hearing. Those Petitions are being filed simultaneously with this Petition.

Introduction.

By Order dated April 12, 1963 (served April 19, 1963), the Commission authorized the parties to file Petitions for Modification or Reconsideration on or before July 26, 1963, and Replies thereto on or before September 11, 1963, and stated that in all other respects its Order of March 21, 1963, shall continue in effect until further Order of the Commission.

The Katy and Frisco filed a Petition with the Commission to postpone or withdraw the July 1, 1963, effective date of its Order until the Commission had fully considered and acted upon the Petitions for Modification, Reconsideration and Replies of the parties in order to give the parties, including the Katy and the Frisco, a full hearing and the proper consideration to which they are entitled.

By order dated June 20, 1963 (served June 24, 1963), the Commission, among other things, denied the Petitions of the Mountain-Pacific carriers, and the request of the Katy and the Frisco railroads for a postponement or withdrawal of the July 1, 1963, effective date of its Order.

Thereafter, the Mountain-Pacific Lines filed a Complaint (Civil Action No. 63-745-EC) in the District Court of the [fol. 1433] United States for the Southern District of California, Central Division, to enjoin, set aside, annul and suspend the Commission's Order. Thereafter, the Frisco intervened as a Plaintiff. Certain Western State Utility Commissions also intervened as Plaintiffs. The Eastern Lines, certain lines in the Midwest Group, and the Milwaukee Railroad filed answers, and the matter was heard on application for a temporary restraining order on June 27, 1963, by Honorable E. Avery Crary. On the same day, Judge Crary issued a Temporary Restraining Order enjoining the United States and the Commission from enforcing or attempting to enforce the Commission's Order dated March 21, 1963.

On notice to all of the parties, the application for an interlocutory injunction was heard on July 11, 1963, by three Judges, sitting as a District Court, composed of the Honorable Stanley N. Barnes, Honorable William C. Mathes and Honorable E. Avery Crary. After hearing the arguments of all the parties, the Court took the matter under advisement.

On July 17, 1963, the three-Judge Court issued a proposed judgment for an interlocutory injunction, in which it enjoined, restrained and suspended the Commission's Order, as amended, pending final hearing and determination of this action by the Court or until further Order of the Court.

The Revenue Losses of the Katy and Frisco.

The situation on the Katy and Frisco is unique. In all proceedings before the Commission, they were aligned with the Midwestern Group of railroads until the Commission's order of March 21, 1963. It was and is the Group's position, as well as that of the Katy and Frisco, that their divisions are too low.

The Katy and Frisco are in particular agreement with the position taken by the Midwestern Group in their quest to eliminate the inflation given to the Eastern railroads and

to further decrease the 10 per cent inflation retained by the Mountain-Pacific Lines under the Commission's decision. This would follow the principles of uniformity announced [fol. 1434] by the Commission in the Class Rate Investigation, 281 ICC 213 (1951).

The Katy and Frisco are in the position of having to file this Petition for Modification and Reconsideration of the Commission's Findings, Report and Order, as amended, in which, for the first time, the Commission will be advised that its Order has a different effect upon the Katy and Frisco than was apparently contemplated by the Commission, which grouped the Katy and Frisco with all of the other Midwestern railroads in its Report and Order. The Commission will also be so advised in a Petition for Rehearing and Further Hearing which Katy and Frisco are filing simultaneously with this Petition.

The Katy and Frisco, and apparently one or two other railroads in the Midwestern Group, are the only ones which have suffered consequential losses because of the Commission's Order, which has drastically changed the mechanics of the present group basis of divisions.

Ordinarily, in a case such as this, the Commission, through the device of exceptions to an Examiner's Report and/or Petitions for Reconsideration of a Report of a Division of the Commission or Petitions for Reconsideration of a Report by the entire Commission, such as this, have been advised of the effect of its Order upon the various parties. However, the revolutionary changes in the present Transcontinental divisions brought about by the Commission's Orders and radical changes in the divisions recommended by the Examiners have created serious procedural difficulties. Thus, for the first time the full impact upon the Katy and Frisco was not known until after the Commission's Order of March 21, 1963, was issued (as amended by its Order of June 20, 1963). This Petition is our first opportunity to take exceptions to many matters which were not contained in the Examiner's proposed Report, but which are contained in the Commission's Orders.

In anticipation of a decision in these proceedings, and in the belief that the 1953 studies no longer represented present-day conditions, the Frisco, early in the year 1962, had drawn off the carload abstracts for October, 1961, a [fol. 1435] then completed accounting record, of the traffic involved in these proceedings in order to determine the effect of the anticipated prescribed divisions. The study included every abstract on which the total freight revenue exceeded $5,000, and every fifth of all other abstracts. The results of that study are shown in Appendix A.

This Appendix illustrates Frisco's traffic pattern, and for the month of October, 1961 shows the following: On Official-Transcontinental traffic, a loss of $13,047; on traffic that originates or terminates on the Frisco, a loss of $21,325; on Frisco's intermediate traffic when to or from other Southwestern lines, a loss of $5,369. The sole exception to these losses is an increase to the Frisco on traffic when intermediate to or from Western Trunk Lines, on which there is an increase of only $249. Projecting these figures to an annual basis (October, 1961 freight revenue was 9.33 per cent of the 1961 freight revenue) results in a net loss in excess of $423,000.

By far the greatest part of these losses are incurred by Frisco on intraterritorial traffic for services in the Southwest and principally where origination or termination service is required, as shown in the following recapitulation:

Southwest Traffic—	
Received and Forwarded	$ 21,325 loss
Southwest Traffic—	
Frisco Intermediate	5,369 loss
Western Trunk Lines—	
Frisco Intermediate	249 gain
Official—	
Frisco Intermediate	13,047 loss
October—	
Net Frisco	$ 39,492 loss
Year 1961—	
Net loss to Frisco (October $39,492 loss ÷ 9.33%)	$423,282 loss

The Katy made a similar study of carload freight traffic for October, 1961, separated as between interline received, interline forwarded, and interline intermediate, as shown in the following table:

[fol. 1436]

Statement of Katy Revenue From and to Transcontinental Freight Bureau Territory for October, 1961

	No. of Cars	Total Revenue	—M-K-T Revenue— As settled	as Proposed	Gain or Loss	
Interline received	748	$ 615,419	$130,737	$105,298	$25,438	loss
Interline forwarded	531	507,116	92,501	95,512	3,011	gain
Interline intermediate	1,187	1,238,516	176,382	188,179	11,797	gain
Grand total	2,466	$2,361,051	$399,620	$388,990	$10,630	gain loss

Year 1961—Net loss to Katy (October loss, $10,630 ÷ 8.05%) $132,050.

As shown above, Katy's freight revenue in October, 1961 was 8.05% of its total freight revenue for the year 1961 and, projected on a yearly basis, Katy's total loss for the year 1961 would have been $132,050 had the proposed divisions been in effect during that year. This yearly loss of $132,050 results from a yearly loss of $316,000 on traffic moving to the Southwest less gains on interline forwarded and interline intermediate. Thus, it will be seen that the losses will occur principally on traffic to Katy destinations in Southwestern territory.

The transfer of approximately $420,000 of the Frisco's revenue, and approximately $132,000 of the Katy's revenue, to the Eastern and Mountain-Pacific railroads would severely injure the Katy and Frisco, and would not solve the basic problems of these two groups of railroads one iota.

There has been no showing that the "revenue needs" of any of these groups are greater than the "revenue needs" of the Katy and Frisco, and nothing in the record before the Commission or its decision justifies the Commission taking such action in transferring their revenue to the other carriers.

The Frisco will suffer losses amounting to about 9% of the net income of the Frisco for the year 1961, and with the same loss in income in 1962, the loss would be 6.5% of the net income for that year.

As heretofore shown, had the proposed divisions been in effect in the year 1961, the Katy's loss on freight traffic in that year would have been $132,050, which is 95% of its net income of $139,202 in the year 1961, and which is $119,714 more than its net income of $12,336 in the year 1962. Stated differently, the proposed divisions would have reduced [fol. 1437] Katy's net income to $7,152 in 1961, and would have caused a deficit of $119,714 in Katy's net income in the year 1962.

The following table, from which some of the foregoing figures were taken, emphasizes the inability of the Katy to absorb the losses caused by the proposed divisions.

Statement of Katy Net Railway Operating Revenue, Net Income, and Rate of Return on Investment

Year	Net Railway Operating Revenue	Net Income		Rate of Return
1958	$4,438,335	2,749,571	Deficit	1.59
1959	3,781,657	2,985,246	Deficit	1.38
1960	3,721,480	3,195,409	Deficit	1.38
1961	2,839,250	139,202		1.07
1962	2,596,784	12,336		1.04

Revenue losses to the Katy and Frisco on this traffic would have a detrimental effect on the ability of these railroads to meet the service needs of their shippers and their ability to perform adequate service. The Commission should not permit such losses to become effective without evidence to support such an Order.

Because of a number of unknown factors, the full impact of the Commission's Orders is not known to us at this time, and it may develop that the annual losses of the Katy and Frisco could greatly exceed the amounts shown above.

It now appears that the Eastern railroads, along with most of the Midwestern Group of railroads, will be the principal beneficiaries of the Commission's Orders. Also, that the Mountain-Pacific railroads will benefit from the Commission's Orders in the transportation of eastbound transcontinental lumber traffic from the northwest to destinations on the Katy and Frisco partially because of the geographical position of the Katy and Frisco and the drastic change made by the Commission in the format of its Orders.

Some of the other Midwestern carriers which operate in the Southwestern Territory have extensive lines of rail- [fol. 1438] roads in Western Trunk Line Territory, and interchange traffic with Transcontinental Lines at the recognized Mountain-Pacific gateways. In such situations they will enjoy, under the Commission's Orders, a continuation of the primary divisions formula over these gateways. Those lines, like the Katy and Frisco, also have routes through the Southwest where they interchange with the defendant Transcontinental carriers, occurring at junctions within the Southwest. There is no question but that on such traffic they, like the Katy and Frisco, will suffer losses in revenue, but they will have compensating increases on traffic where the Commission continues primary divisions for their account at the Colorado junctions. It should be obvious why the Katy and Frisco, who would not receive sufficient offsetting increases like those of the above carriers, must seek relief by placing their serious plight before the Commission.

In the Court proceeding, it was alleged that the Eastern Lines stand to gain in excess of $23,000,000, and that the Midwestern Group, excepting the Katy and Frisco, stand to gain approximately $7,700,000. At the same time, the Katy and Frisco would have severe losses, as shown above. It is also believed that other lines serving Southwestern Territory would have corresponding losses on their traffic on which their service involves only the Southwest.

If the Commission's Order is based on "revenue needs", as it appears to be from its language on page 76 of the Report, then the Commission should know the adverse effect upon the revenues of the Katy and Frisco before transferring their revenues to other and financially stronger railroads.

Analysis of the Commission's decision shows that a most serious result of the Orders would be to substantially decrease the divisions of the Katy and Frisco on eastbound transcontinental lumber traffic from the northwest to destinations on the Katy and Frisco. Certainly nothing in the Commission's decision justifies making the Mountain-Pacific Lines the principal beneficiaries of such Commission action on lumber traffic.

[fol. 1439] In Appendix B, we have listed representative origins and destinations, selecting points in the Eastern Groups in Midwestern Territory and in Transcontinental Territory.

Via principal routes used by the Katy and Frisco the divisions for their account are shown as presently published, also as ordered, applied to assumed carload shipments having total freight revenues of $800, $1,000 and $1,200, which amounts are representative of the typical revenue on numerous movements between the points chosen.

As an example, the divisions prescribed in the Orders on a hypothetical movement from Los Angeles to Pittsburgh via Avard to East St. Louis, show a reduction of 5.3 percentage points to the Frisco, or losses of $42 per car on an $800 shipment, $53 per car on a $1,000 shipment, and $64 per car on a $1,200 shipment.

The lower table of Appendix B, shows the present percentages compared with the prescribed percents in the Orders as applied to the Katy and Frisco on lumber from the Pacific Northwest to destinations on their lines via Kansas City involving hauls of varying lengths into the Southwest Territory. Again, revenue figures are shown for carload freight charges of $800, $1,000 and $1,200,

wherein it will be noted that the revenue losses run as high as $163 per car.

To have the Commission make arbitrary decreases in the percentages to be received by the Katy and Frisco, without making any findings as to the revenue to be transferred, or findings to justify such a transfer, is unlawful.

It is difficult to believe that the Commission intended to inflict serious revenue losses upon the Katy and Frisco which appear to be contrary to the effect of the Commission's Orders granting higher divisions to other Midwestern roads.

[fol. 1440]

Differing Position Of Katy and Frisco From That Taken by the Midwestern Group Relating To Subdivisions in Midwestern Territory

(See Midwestern Petition, pages 50-51, 54-56.)

In the Petition being filed for account of the Midwestern complainants in a chapter headed "Miscellaneous Technical Errors and Oversights in the Report and Order of the Commission", under sub-heading "J" and "K", they discuss the provisions of paragraphs (c) and (d) of Appendix C of the Report, and suggest modifications alleging that equalization in part or closer to parity of divisions by what they term "Midwest-East gateways" Kansas City, Mo., Omaha, Neb., St. Louis, Mo., East St. Louis, Ill. and others will result from their suggestions.

The Katy and Frisco are also interested in increasing their divisions and have an interest in the preservation of some equalization of divisions east of Kansas City on shipments they handle in that area. Nevertheless, the Katy and Frisco are forced to point out that the adoption of the suggestions of the other Midwestern Lines would further injure the Katy and Frisco on a large portion of the traffic in which they participate as intermediate carriers between their Transcontinental connecting carriers in Oklahoma

and Texas and their Midwestern connecting lines at Kansas City or St. Louis.

This is clearly illustrated by some typical examples shown in Appendix C attached hereto. It will be noted from Appendix C herein that on a shipment from Los Angeles to Chicago routed Southern Pacific through El Paso to Fort Worth, Katy to East St. Louis and connections beyond, the Midwestern Lines' suggested modifications of paragraph (d) of Appendix C of the Commission's Report would increase the Midwest-East Lines' proportion beyond East St. Louis from the present per cent of 11.0 to 16.2. While the Commission's Orders as now written provide no subdivisions between complainant carriers, the prescribed divisions for lines between El Paso and Chicago if subdivided on a pro-rate of existing divisions would allow the [fol. 1441] Katy 24.0 per cent. The Midwestern Lines' suggested modification is likewise silent as to how the joint proportion accruing to the joint hauls between the Midwest-East border gateways and the Mountain-Pacific gateways should subdivide. We have shown the subdivisions which would result if the ordered subdivision for account of the intermediate Transcontinental Line is observed allowing the Katy the remainder, or 19.2 per cent.

As another example, on page 3 of Appendix C herein it will be observed that on a shipment from Los Angeles to Pittsburgh routed via the Santa Fe through Belen, N. M. to Floydada, Tex., QA&P to Quanah, Tex., Frisco to Kansas City, CGW to Chicago and an eastern line beyond, that the Frisco and QA&P (a wholly-owned Frisco subsidiary) jointly receive at present 20.2 per cent from Floydada to Kansas City under the Commission's Orders. The division from Floydada to Chicago pro-rated over Kansas City in the same proportion as are the present divisions would allow for the same service 16.9 per cent. A subdivision on the Midwestern Lines' suggested modification would allow but 13.2 per cent for the same service if the intermediate service of the Santa Fe in Midwestern Terri-

tory from Belen, N. M. to Floydada, Tex. is allotted on the prescribed basis, and the CGW is allotted the divisions resulting from the Midwestern Group's suggested basis. Note, however, that CGW's proportion would be increased from the presently applicable 13.8 per cent to 15.0 per cent. Attention is also directed to the fact that on the same shipment, the Commission's Orders would enhance the Eastern Lines' proportion by 33⅓ per cent, by increasing their present division from 16.5 per cent to 22.0 per cent.

It is the position of the Katy and Frisco that while the Midwestern Group's suggestions may have merit in an attempt to equalize divisions east of the so-called Midwest-East border gateways, the application thereof would further injure the Katy and Frisco on traffic in which those carriers participate west and south of such border gateways. It is therefore the suggestion of the Katy and Frisco that should the Commission consider granting any modifi-
[fol. 1442] cation as suggested by the Midwestern Group, that such modification be restricted so as not to apply on shipments routed through Mountain-Pacific gateways south of Colorado junctions.

Conclusion.

The Commission should grant this Petition and modify its Report and Orders in such manner as to eliminate the inequities and injustices to the Katy and Frisco as above set forth.

Respectfully submitted,

Missouri-Kansas-Texas Railroad Company, St. Louis-San Francisco Railway Company, William A. Thie, Monroe E. Clinton, Ernest D. Grinnell, Jr., John E. McCullough, Their Attorneys.

Due Date: July 26, 1963.

Certificate of Service.

I hereby certify that I have this day served the foregoing petition upon all parties of record in these proceedings by mailing by first-class mail a copy thereof properly addressed to counsel for such parties.

Dated at St. Louis, Missouri, this 25th day of July, 1963.

John E. McCullough, Of Counsel for Katy and Frisco.

300 Frisco Building,
St. Louis (1), Missouri.

APPENDIX A.

Statement of Revenue
From and to Transcontinental Territory for Oct. 1961.

	No. of Cars	Total Revenue	FRISCO REVENUE Gross	As Settled St. L. Bridge	Net	Gross	As Proposed St. L. Bridge	Net	Gain or Loss
Official Territory									
Eastbound	418	$ 518,667.32	$ 91,697.98	$ 8,197.02	$ 83,500.96	$ 91,952.84	$ 8,197.02	$ 83,755.82	$+ 254.86
Westbound	644	780,440.73	198,440.01	12,895.56	185,544.45	172,242.35	None	172,242.35	−13,302.10
Total	1062	1,299,108.05	290,137.99	21,092.58	269,045.41	264,195.19	8,197.02	255,998.17	−13,047.24
Frisco									
Received—									
Eastbound	1336	1,099,741.40	213,599.23	203.40	213,395.83	191,052.84	203.40	190,849.44	−22,546.39
Forwarded—									
Westbound	952	758,594.50	174,866.57	None	174,866.57	176,087.82	None	176,087.82	+ 1,221.25
Total	2288	1,858,335.90	388,465.80	203.40	388,262.40	367,140.66	203.40	366,937.26	−21,325.14
Southwestern Territory									
Frisco Intermediate									
Eastbbound	190	164,999.55	19,132.75	None	19,132.75	14,579.10	None	14,579.10	− 4,553.65
Westbound	65	79,489.80	10,295.35	None	10,295.35	9,479.85	None	9,479.85	− 815.50
Total	255	244,489.35	29,428.10	None	29,428.10	24,058.95	None	24,058.95	− 5,369.15
Western Trunk Line Territory									
Frisco Intermediate									
Eastbound	40	39,237.35	9,036.15	711.90	8,324.25	9,716.65	711.90	9,004.75	+ 680.50
Westbound	65	74,895.70	17,753.70	406.80	17,346.90	16,915.60	None	16,915.60	− 431.30
Total	105	114,133.05	26,789.85	1,118.70	25,671.15	26,632.25	711.90	25,920.35	+ 249.20
Total Eastbound	1984	$1,822,645.62	$333,466.11	$ 9,112.32	$324,353.79	$307,301.43	$ 9,112.32	$298,189.11	$−26,164.68
Total Westbound	1726	1,693,420.73	401,355.63	13,302.36	388,053.27	374,725.62	None	374,725.62	−13,327.65
Grand Total	3710	$3,516,066.35	$734,821.74	$ 22,414.68	$712,407.06	$682,027.05	$ 9,112.32	$672,914.73	$−39,492.33

[fol. 1444]

APPENDIX B.

PRESENT PERCENTS AND REVENUE WHICH ACCRUE TO THE FRISCO OR KATY COMPARED TO THE PERCENTS AND REVENUE WHICH WOULD ACCRUE AS RESULT OF COMMISSION'S ORDER.

Origin	Destination	Frisco	Percents			Frisco or Katy Revenue on Assumed Revenue Per Car Of $800			$1,000			$1,200		
			Present	Ordered	Loss	Present	Ordered	Loss	Present	Ordered	Loss	Present	Ordered	Loss
Los Angeles	Boston	Floydada to E. St. Louis	24.5	20.5	— 4.0	$196	$164	$ 32	$245	$205	$ 40	$294	$246	$ 48
Los Angeles	Boston	Sherman to E. St. Louis	19.0	15.7	— 3.3	152	126	26	190	157	33	228	188	40
Phoenix	New York	Floydada to E. St. Louis	24.7	22.2	— 2.5	198	178	20	247	222	25	296	266	30
Los Angeles	Syracuse	Floydada to E. St. Louis	25.6	22.4	— 3.2	205	179	26	256	224	32	307	269	38
Phoenix	Syracuse	Avard to E. St. Louis	22.0	19.3	— 2.7	176	154	22	220	193	27	264	232	32
Los Angeles	Pittsburgh	Avard to E. St. Louis	24.8	19.5	— 5.3	198	156	42	248	195	53	298	234	64
Phoenix	Pittsburgh	Avard to E. St. Louis	24.8	20.9	— 3.9	198	167	31	248	209	39	298	251	47
Los Angeles	Detroit	Sherman to E. St. Louis	23.4	20.2	— 3.2	187	162	25	234	202	32	281	242	39
Phoenix	Detroit	Floydada to E. St. Louis	30.1	28.7	— 1.4	241	230	11	301	287	14	361	344	17
Los Angeles	Southern Illinois	Avard to E. St. Louis	27.6	22.1	— 5.5	221	177	44	276	221	55	331	265	66
Phoenix	Southern Illinois	Floydada to E. St. Louis	32.0	31.9	— 0.1	256	255	1	320	319	1	384	383	1
Los Angeles	Memphis, Tenn.	Floydada to Memphis	35.0	34.3	— 0.7	280	274	6	350	343	7	420	412	8
St. Louis, Mo.	Los Angeles	St. Louis to Floydada	36.0	35.4	— 0.6	288	283	5	360	354	6	432	425	7
St. Louis, Mo.	Los Angeles	St. Louis to Ellsworth	24.0	22.4	— 1.6	192	179	13	240	224	16	288	269	19
Okla. City, Ok.	Los Angeles	Okla. City to Kansas City	20.0	14.8	— 5.2	160	118	42	200	148	52	240	178	62
Rogers, Ark.	Los Angeles	Rogers to Floydada	35.0	J 30.4	— 4.6	280	243	37	350	304	46	420	365	55
		Katy												
Yakima, Wash.	San Antonio	Kansas City to San Antonio	30.0	27.4	— 2.6	240	219	21	300	274	26	360	329	31
Los Angeles	New York	Ft. Worth to E. St. Louis	16.8	16.0	— 0.8	134	128	6	168	160	8	202	192	10
Los Angeles	Pittsburgh	Ft. Worth to E. St. Louis	27.5	25.0	— 2.5	220	200	20	275	250	25	330	300	30
Los Angeles	Southern Illinois	Ft. Worth to E. St. Louis	21.8	21.6	— 0.2	174	173	1	218	216	2	262	259	3
Oakland	Ypsilanti, Mich.	Ft. Worth to E. St. Louis	20.4	17.5	— 2.9	163	140	23	204	175	29	245	210	35
Ft. Bragg, Cal.	Dallas	Kansas City to Dallas	25.0	14.9	—10.1	200	119	81	250	149	101	300	179	121
Ft. Bragg, Cal.	Houston	Kansas City to Houston	29.0	22.4	— 6.6	232	179	53	290	224	66	348	269	79

Note: The above percents will also apply on traffic routed in reverse direction, however, the difference on shipments routed through the E. St. Louis-St. Louis gateway westbound will be somewhat less since the Frisco or Katy will not bear their proportion of the Mississippi River bridge charge under the order.

PRESENT LUMBER PERCENTS AND REVENUE WHICH ACCRUE TO THE FRISCO OR KATY COMPARED TO THE PERCENTS AND REVENUE WHICH WOULD ACCRUE AS RESULT OF COMMISSION'S ORDER.

Origin	Destination	Frisco	Percents			Frisco or Katy Revenue on Assumed Revenue Per Car Of $800			$1,000			$1,200		
			Present	Ordered	Loss	Present	Ordered	Loss	Present	Ordered	Loss	Present	Ordered	Loss
Dillard, Ore.	Okla. City	Kansas City to Okla. City	26.6	15.0	—11.6	$213	$120	$ 93	$266	$150	$116	$319	$180	$139
Dillard, Ore.	Portageville, Mo.	Kansas City to Portageville	22.4	20.1	— 2.3	179	161	18	224	201	23	269	241	28
Weed, Cal.	Ft. Smith, Ark.	Kansas City to Ft. Smith	17.5	16.8	— 0.7	140	134	6	175	168	7	210	202	8
		Katy												
Dillard, Ore.	Tulsa	Kansas City to Tulsa	19.9	14.4	— 5.5	159	115	44	199	144	55	239	173	66
Medford, Ore.	Wichita Falls, Tex.	Kansas City to W. Falls	31.6	18.0	—13.6	253	144	109	316	180	136	379	216	163
Ranier, Ore.	Dallas	Kansas City to Dallas	31.6	21.3	—10.3	253	170	83	316	213	103	379	256	123

[fol. 1445]

APPENDIX C.

(Page 1 of 3 Pages)

Comparison of Percents of the Katy or Frisco as Presently Applicable as Result of Commission's Order and as Result of Modification of Appendix C Suggested by the Midwestern Group.

Midwestern Lines' suggested modification of Appendix C would subdivide joint proportions accruing to Midwestern Lines and intermediate Transcontinental defendants first over the so-called Midwest-east border gateways of St. Louis or Kansas City using for Midwest-East Lines Column factor on shipments originating or terminating in Midwest Territory and Column 2 factor on Eastern traffic and Column 2 factors through between the Midwest-east border gateway and the Mountain Pacific gateway.

Suggested Modification of Midwestern Lines for account Midwest-East Lines and the ordered subdivision for intermediate defendant with remainder accruing to the intermediate Southwestern Katy or Frisco.

[fol. 1446]

(See opposite) ☞

APPENDIX C.

(Page 2 of 3 Pages)

Comparison of Percents of the Katy or Frisco as Presently Applicable as Result of Commission's Order and as Result of Modification of Appendix C Suggested by the Midwestern Group.

Origin and Destination	Route	Divisions: Present	Ordered	Midwest-East Suggested Basis
Los Angeles, Calif. Chicago, Ill.	SP El Paso	43.6	42	42
	SP Ft. Worth	20.5	22.6	22.6
	Fco E. St. Louis	24.9	35.4* (24.6	19.2
	Beyond	11.0	(10.8	16.2
Los Angeles, Calif. Chicago, Ill.	SP El Paso	43.6	42	42
	SP Ft. Worth	22.2	22.6	22.6
	MKT E. St. Louis	23.2	35.4* (24	19.2
	Beypnd	11	(11.4	16.2
Los Angeles, Calif. Chicago, Ill.	AT&SF Belen	57	45	45
	AT&SF Floydada		16	16
	Fco E. St. Louis	32	39* (30.2	22.5
	Beyond	11	(8.8	16.5
Los Angeles, Calif. Chicago, Ill.	SP El Paso	44	42	42
	SP Ft. Worth	18.6	22.6	22.6
	Fco Kansas City	20.9	35.4* (19.8	12.8
	Beyond	16.5	(15.6	22.6
Los Angeles, Calif. Chicago, Ill.	SP El Paso	44.0	42	42
	SP Ft. Worth	19	22.6	22.6
	MKT Kansas City	20.5	35.4* (19.6	12.8
	Beyond	16.5	(15.8	22.6
Los Angeles, Calif. Chicago, Ill.	AT&SF Belen	59.3	45	45
	AT&SF Floydada		16	16
	Fco Kansas City	24.2	39* (23.2	16.5
	Beyond	16.5	(15.8	22.5
Los Angeles, Calif. Milwaukee, Wisc.	SP El Paso	44	41	41
	SP Ft. Worth	18.6	22.4	22.4
	Fco Kansas City	20.9	36.6* (20.5	13
	Beyond	16.5	(16.1	23.6
Los Angeles, Calif. Milwaukee, Wisc.	SP El Paso	44	41	41
	SP Ft. Worth	19	22.4	22.4
	MKT Kansas City	20.5	36.6* (20.3	13
	Beyond	16.5	(16.3	23.6
Los Angeles, Calif. Milwaukee, Wisc.	AT&SF Belen	59.3	44	44
	AT&SF Floydada		15.7	15.7
	Fco Kansas City	24.2	40.3* (24	16.2
	Beyond	16.5	(16.3	24.1

* Commission's order prescribes no subdivisions between complainants and percents bearing this reference reflect a revenue prorate of present divisions.

APPENDIX C.

(Page 3 of 3 Pages)

Comparison of Percents of the Katy or Frisco as Presently Applicable as Result of Commission's Order and as Result of Modification of Appendix C Suggested by the Midwestern Group.

Origin and Destination	Route	Divisions		
		Present	Ordered	Midwest-East Suggested Basis
Los Angeles, Calif. Pittsburgh, Pa.	SP El Paso	36.7	34.3	34.3
	SP Ft. Worth	15.5	18.4	18.4
	Fco Kansas City	17.5	25.3* (14.1	10
	CGW Chicago	13.8	(11.2	15.3
	Beyond	16.5	22	22
Los Angeles, Calif. Pittsburgh, Pa.	SP El Paso	36.7	34.3	34.3
	SP Ft. Worth	17.2	18.4	18.4
	MKT Kansas City	15.8	25.3* (13.5	10
	CGW Chicago	13.8	(11.8	15.3
	Beyond	16.5	22	22
Los Angeles, Calif. Pittsburgh, Pa.	AT&SF Belen / AT&SF Floydada	49.5	36.7 / 12.8	36.7 / 12.8
	Fco Kansas City	20.2	28.5* (16.9	13.2
	CGW Chicago	13.8	(11.6	15.3
	Beyond	16.5	22	22

* Commission's order prescribes no subdivisions between complainants and percents bearing this reference reflect a revenue prorate of present divisions.

[fol. 1448] *Duly sworn to by Stanley F. Stecher, jurat omitted in printing.*

[fol. 1449] Proof Of Service by Mail (omitted in printing).

[fol. 1451]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

SUPPLEMENTAL COMPLAINT OF PLAINTIFFS AND OF INTERVENING PLAINTIFFS AMADOR CENTRAL RAILROAD COMPANY, ET AL.—Filed March 20, 1964

Plaintiffs, The Atchison, Topeka and Santa Fe Railway Company, et al., and intervening plaintiffs Amador Central Railroad Company, et al., by their attorneys, for supplemental statement of their claim against defendants, respectfully allege:

I.

In the complaint filed in this Court on June 25, 1963, plaintiffs sought a temporary restraining order, an inter- [fol. 1452] locutory injunction and a permanent injunction against an order of the Interstate Commerce Commission issued on March 21, 1963, and amended on June 20, 1963, in its Docket No. 31503, as more fully identified in Paragraph I of that complaint. On June 27, 1963, the temporary restraining order was granted by the District Judge to whom the case was assigned, and, on August 3, 1963, the interlocutory injunction was granted by order of the full

[File endorsement omitted]

statutory court, as required by Section 2284 of Title 28, United States Code. Because proceedings were still pending before the Commission in connection with petitions for reconsideration, reargument and further hearing on the March 21, 1963 order, plaintiffs did not then request a trial of the issue of whether they were entitled to a permanent injunction.

II.

On January 22, 1964, the Commission served its supplemental report and order in Docket No. 31503 and Sub Nos., dated December 31, 1963, in which it undertook to deal with and dispose of all petitions pending before it. A copy of said report and a copy of said order, marked Exhibit A and Exhibit B, respectively, are attached hereto. The effect of this supplemental report and order was, except for minor technical changes made in the mechanics of its original order, to deny all requests for reconsideration and modification of the Commission's previous action. The supplemental order is essentially identical to the original order of March 21, 1963, and for the most part, the grounds set forth to justify that order in the supplemental report are essentially the same as those relied upon in the original report. On February 7, 1964, the Commission served a [fol. 1453] notice to the parties in said Docket No., dated February 4, 1964, making certain corrections of a minor nature in its supplemental report and order of December 31, 1963. A copy of said notice to the parties is attached hereto and marked Exhibit C.

III.

The Commission's supplemental report and order are unlawful for the same reasons and upon the same grounds as the original report and order of March 21, 1963, which reasons and grounds are specifically described in Paragraphs XV through XIX, inclusive, of the complaint herein. Each of these paragraphs is incorporated herein as also

applicable to the supplemental report and order of December 31, 1963.

IV.

To the extent that the Commission's supplemental report injects any new factual grounds into its reasoning in support of its orders, such grounds are not supported by adequate or substantial evidence, but rest upon assumptions of fact directly contrary to the evidence.

V.

In making amendments to the March 21, 1963 order by its order of June 20, 1963, the Commission failed to provide for the 30-day notice period required by Section 15(2) of the Interstate Commerce Act, and the plaintiffs contend [fol. 1454] that the amendments to the March 21, 1963 order are unlawful on that ground. Although the Commission disagreed with this contention on reconsideration, it nonetheless saw fit to set forth in its supplemental order all of the provisions of the March 21, 1963 order, as amended by the order of June 20, 1963, with a new effective date of March 30, 1964, thus providing for the 30-day notice period required. In addition, the supplemental order provides that the minor technical changes found necessary in the supplemental report should become effective on or before March 30, 1964.

VI.

An interlocutory injunction should be entered herein upon this supplemental complaint containing the same terms and provisions with respect to the Commission's order of December 31, 1963 as were contained in the interlocutory injunction heretofore entered by this Court with respect to the Commission's order of March 21, 1963, as amended by its order of June 20, 1963. The grounds justifying the interlocutory injunction with respect to the Commission's order of March 21, 1963, as set forth in the

Court's findings of fact and conclusions of law upon which that injunction is based, are equally applicable to the order of December 31, 1963.

Wherefore, plaintiffs pray:

1. That an interlocutory injunction upon supplemental complaint be made and entered with the same terms and provisions with respect to the Commission's order of [fol. 1455] December 31, 1963 as were contained in the interlocutory injunction heretofore entered by this Court with respect to the Commission's order of March 21, 1963, as amended by its order of June 20, 1963.

2. That, if required to maintain the *status quo* pending the hearing and determination of plaintiffs' and intervening plaintiffs' applications for an interlocutory injunction, a temporary restraining order issue restraining the operation, enforcement or execution of the order of the Commission dated December 31, 1963, pending said hearing and determination.

3. That the operation, enforcement and execution of the order of December 31, 1963, be perpetually enjoined and permanently set aside, annulled and suspended.

4. That plaintiffs recover their proper costs.

5. That plaintiffs have such other and further relief in the premises as in equity may be deemed meet and just by this Honorable Court.

Dated: March 11, 1964.

O'Melveny & Myers, Homer I. Mitchell, Warren M. Christopher, Donald M. Wessling; Sidley, Austin, Burgess & Smith, Douglas F. Smith, Howard J. Trienens, George L. Saunders, Jr., By Homer I. Mitchell, Attorneys for Plaintiffs and for Intervening Plaintiffs Amador Central Railroad Company, et al.

[fol. 1456] *Duly sworn to by A. J. Stilling, jurat omitted in printing.*

[fol. 1457] Affidavit of Service (omitted in printing).

[fol. 1460]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

APPLICATION FOR INTERLOCUTORY INJUNCTION AND TEMPORARY RESTRAINING ORDER UPON SUPPLEMENTAL COMPLAINT AND UPON AMENDED COMPLAINT—Filed March 20, 1964

1. On June 27, 1963, the District Judge to whom the [fol. 1461] above-entitled case was assigned granted a temporary restraining order against an order of the Interstate Commerce Commission issued on March 21, 1963, and amended on June 20, 1963, in its Docket No. 31503. On August 3, 1963, the full statutory court, as required by Section 2284 of Title 28, United States Code, granted an interlocutory injunction against the Commission's order.

2. At the time said temporary restraining order and said interlocutory injunction were granted, proceedings were pending before the Commission in connection with petitions for reconsideration, reargument and further hearing. On January 22, 1964, the Commission served its supplemental report and order in Docket No. 31503 and Sub Nos., dated December 31, 1963, as more fully identified in paragraph II of the supplemental complaint herein.

3. The parties to the above-entitled action have stipulated that a Judgment for Interlocutory Injunction on

[File endorsement omitted]

Supplemental Complaint and on Amended Complaint, said Judgment to be in the form attached to said Stipulation, may be made and entered by the above entitled Court without the filing of Findings of Fact or Conclusions of Law.

Wherefore, plaintiffs and intervening plaintiffs pray that an interlocutory injunction upon supplemental complaint and upon amended complaint be made and entered in accordance with said stipulation that a Judgment for Interlocutory Injunction on Supplemental Complaint and on Amended Complaint may be made and entered.

[fol. 1462] Dated: March 16, 1964.

O'Melveny & Myers, Homer I. Mitchell, Warren M. Christopher, Donald M. Wessling; Sidley, Austin, Burgess & Smith, Douglas F. Smith, Howard J. Trienens, George L. Saunders, Jr., By Homer I. Mitchell, Attorneys for Plaintiffs and for Intervening Plaintiffs Amador Central Railroad Company, et al.;

Gibson, Dunn & Crutcher, Dean C. Dunlavey, Ernest D. Grinnell, Jr., John E. McCullough, By Dean C. Dunlavey, Attorneys for Intervening Plaintiff St. Louis-San Francisco Railway Company.

[fol. 1463] Affidavit of Service (omitting in printing).

[fol. 1466]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

STIPULATION AND ORDER GRANTING LEAVE TO FILE SUPPLEMENTAL COMPLAINT OF PLAINTIFFS AND INTERVENING PLAINTIFFS AMADOR CENTRAL RAILROAD COMPANY, ET AL., AND AMENDED COMPLAINT OF INTERVENING PLAINTIFF ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY AND FIXING TIME FOR PLEADING THERETO—March 20, 1964

Plaintiffs The Atchison, Topeka and Santa Fe Railway Company, et al., and intervening plaintiffs Amador Central Railroad Company, et al., having heretofore served upon all parties their Supplemental Complaint verified by A. J. Stilling on March 2, 1964, and intervening plaintiff St. Louis-San Francisco Railway Company having served [fol. 1467] upon all parties its Amended Complaint verified by Stanley F. Stecher on March 6, 1964, Now, Therefore, It Is Hereby Ordered:

1. That leave to file said Supplemental Complaint and said Amended Complaint is hereby granted.

2. That defendants and intervening defendants shall have 30 days from the date of this Order within which to plead to said Supplemental Complaint and said Amended Complaint.

Dated: March 20, 1964.

E. Avery Crary, Judge.

[File endorsement omitted]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the parties hereto that the foregoing Order may be made and entered by the above-entitled Court.

Dated: March 20, 1964.

O'Melveny & Myers, Homer I. Mitchell, Warren M. Christopher, Donald M. Wessling, 433 South Spring Street, Los Angeles 13, California.

[fol. 1468] Sidley, Austin, Burgess & Smith, Douglas F. Smith, Howard J. Trienens, George L. Saunders, Jr., 11 South LaSalle Street, Chicago 3, Illinois, By Homer I. Mitchell, Attorneys for Plaintiffs and for Intervening Plaintiffs Amador Central Railroad Company, et al.

Gibson, Dunn & Crutcher, Dean C. Dunlavey, 634 South Spring Street, Los Angeles 14, California.

Ernest D. Grinnell, Jr., John E. McCullough, 906 Olive Street, St. Louis, Missouri, By Dean C. Dunlavey, Attorneys for Intervening Plaintiff, St. Louis-San Francisco Railway Co.

Richard E. Tuttle, Roderick B. Cassidy, J. Thompson Phelps, Cyril M. Saroyan, State Office Building, Civic Center, San Francisco 2, California, By Cyril M. Saroyan, Attorneys for Intervening Plaintiffs, The People of the State of California and The Public Utilities Commission of California.

Robert Y. Thornton, Lloyd G. Hammel, John F. Weisser, 103 Public Service Building, Salem, Oregon.

Joseph Besnah, Suite 305 California Federal Bldg., Inglewood, California, By Joseph Besnah, Attorneys for Intervening Plaintiffs, Arizona Corporation Commission, et al.

[fol. 1469] Francis C. Whelan, United State Post Office and Courthouse, Los Angeles 12, California, By Francis C. Whelan, Attorney for Defendants The United States of America and Interstate Commerce Commission.

Joseph F. Eshelman, 3 Penn Center Plaza, Philadelphia 2, Pa.

Thelen, Marrin, Johnson & Bridges, James W. Baldwin, 811 West Seventh Street, Los Angeles 17, California, By Gordon Johnson, Attorneys for Intervening Defendants The Baltimore and Ohio Railroad Co., et al.

Winston, Strawn, Smith & Patterson, Bryce L. Hamilton, First National Bank Building, Chicago 3, Illinois.

Belnap, Spencer, Hardy & Freeman, Nuel D. Belnap, One North LaSalle Street, Suite 330, Chicago 2, Illinois.

Nye F. Morehouse, c/o Chicago & North Western Ry. Co., 400 West Madison Street, Chicago 6, Illinois.

Newlin, Tackabury & Johnston, George W. Tackabury, Frank R. Johnston, 727 West Seventh Street, Los Angeles 17, California, By Frank R. Johnston, Attorneys for Intervening Defendants Chicago & North Western Railway Co., et al.

[fol. 1470] Raymond K. Merrill, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 888 Union Station, 516 W. Jackson Blvd., Chicago 6, Illinois.

Welsh & Cummins, 1204 Statler Center, 900 Wilshire Blvd., Los Angeles 17, California, By Louis M. Welsh, Attorneys for Intervening Defendant Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

[fol. 1471]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., Plaintiffs,

vs.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

STIPULATION AND ORDER ON PROCEDURE FOR HEARING AND DETERMINATION OF THIS CAUSE—March 20, 1964

It Is Hereby Stipulated by and between the parties hereto that, subject to the approval of the Court, the procedure for the hearing and determination of plaintiffs' and intervening plaintiffs' applications for a permanent injunction in this cause shall be as follows:

1. The parties hereto shall file briefs in accordance with the briefing schedule hereinafter set forth. The parties [fol. 1472] may, but shall not be required to, file their briefs in printed form on 8½" x 11" pages. The parties hereto agree that this case shall be set for hearing on the merits by the Court on a date as soon after the filing of all briefs as shall suit the calendar and convenience of the Court. On said date plaintiffs and intervening plaintiffs will offer and the Court will receive in evidence a certified record of the proceedings before the Interstate Commerce Commission. No further evidence will be offered and the

[File endorsement omitted]

Court will hear oral argument. At the conclusion of oral argument, the case will stand submitted for decision.

2. The briefing schedule shall be as follows:

(a) Opening briefs on behalf of plaintiffs and intervening plaintiffs will be filed on or before April 20, 1964.

(b) Answering briefs on behalf of defendants and intervening defendants will be filed or or before June 22, 1964.

(c) Reply briefs on behalf of plaintiffs and intervening plaintiffs will be filed on or before July 20, 1964.

Dated: March 20, 1964.

O'Melveny & Myers, Homer I. Mitchell, Warren M. Christopher, Donald M. Wessling, 433 South Spring Street, Los Angeles 13, California;

[fol. 1473] Sidley, Austin, Burgess & Smith, Douglas F. Smith, Howard J. Trienens, George L. Saunders, Jr., 11 South LaSalle Street, Chicago 3, Illinois, By Homer I. Mitchell, Attorneys for Plaintiffs and for Intervening Plaintiffs Amador Central Railroad Company, et al.;

Gibson, Dunn & Crutcher, Dean C. Dunlavey, 634 South Spring Street, Los Angeles 14, California;

Ernest D. Grinnell, Jr., John E. McCullough, 906 Olive Street, St. Louis, Missouri, By Dean C. Dunlavey, Attorneys for Intervening Plaintiff, St. Louis-San Francisco Railway Co.;

Richard E. Tuttle, Roderick B. Cassidy, J. Thompson Phelps, Cyril M. Saroyan, State Office Building, Civic Center, San Francisco 2, California, By Cyril M. Saroyan, Attorneys for Intervening Plaintiffs, The People of the State of California and The Public Utilities Commission of California;

Robert Y. Thornton, Lloyd G. Hammel, John F. Weisser, 103 Public Service Building, Salem, Oregon;

Joseph Besnah, Suite 305 California Federal Bldg., Inglewood, California, By Joseph Besnah, Attorneys for Intervening Plaintiffs, Arizona Corporation Commission, et al.;

[fol. 1474] Francis C. Whelan, United States Post Office and Courthouse, Los Angeles 12, California, By Francis C. Whelan, Attorney for Defendants The United States of America and Interstate Commerce Commission;

Joseph F. Eshelman, 3 Penn Center Plaza Philadelphia 2, Pa.;

Thelen, Marrin, Johnson & Bridges, James W. Baldwin, 811 West Seventh Street, Los Angeles 17, California, By Gordan Johnson, Attorneys for Intervening Defendants The Baltimore and Ohio Railroad Co., et al.;

Winston, Strawn, Smith & Patterson, Bryce L. Hamilton, First National Bank Building, Chicago 3, Illinois;

Belnap, Spencer, Hardy & Freeman, Nuel D. Belnap, One North LaSalle Street, Suite 330 Chicago 2, Illinois;

Nye F. Morehouse, c/o Chicago & North Western Ry. Co., 400 West Madison Street, Chicago 6, Illinois;

Newlin, Tackabury & Johnston, George W. Tackabury, Frank R. Johnston, 727 West Seventh Street, Los Angeles 17, California, By Frank R. Johnston, Attorneys for Intervening Defendants, Chicago & North Western Railway Co., et al.;

[fol. 1475] Raymond K. Merrill, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 888 Union Station, 516 W. Jackson Blvd., Chicago 6, Illinois;

Welsh & Cummins, 1204 Statler Center, 900 Wilshire Blvd., Los Angeles 17, California, By Louis M. Welsh, Attorneys for Intervening Defendant Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

So Ordered March 20, 1964.

E. Avery Crary, Judge.

[fol. 1476]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

JUDGMENT FOR INTERLOCUTORY INJUNCTION ON SUPPLEMENTAL COMPLAINT AND ON AMENDED COMPLAINT—Filed and Entered March 24, 1964.

Plaintiffs The Atchison, Topeka and Santa Fe Railway Company, et al. and intervening plaintiffs Amador Central Railroad Company, et al. having filed their supplemental complaint; intervening plaintiff St. Louis-San Francisco Railway Company having filed its amended complaint; each and all of said parties having filed an application for an interlocutory injunction on said supplemental and said amended complaints; and the parties hereto having waived [fol. 1477] findings of fact and conclusions of law and having stipulated that this judgment for interlocutory in-

[File endorsement omitted]

junction on supplemental complaint and on amended complaint may be made and entered by the Court, Now, Therefore, It Is Hereby Ordered:

1. That the enforcement, operation and execution of the Order of the Interstate Commerce Commission dated December 31, 1963, in the proceedings before that Commission in its Docket No. 31503 and Sub Nos., which Order would become effective by its terms on and after March 30, 1964, is hereby enjoined, restrained and suspended pending the final hearing and determination of this action in this Court, or until further order of this Court.

2. The foregoing Order of this Court is subject to the following conditions:

(a) The conditions shall be binding upon the following parties hereto, all of whom have applied for the foregoing Interlocutory Injunction and who will hereinafter be referred to as "Applicants for the Interlocutory Injunction":

Plaintiffs The Atchison, Topeka and Santa Fe Railway Company, The Denver and Rio Grande Western Railroad Company, Great Northern Railway Company, Los Angeles Junction Railway Company, Northern Pacific Railway Company, Santa Maria Valley Railway Company, Southern Pacific Company, Trona Railway Company, Union Pacific Railroad Company, Ventura County Railway Company and The Western Pacific Railroad Company.

Intervening plaintiffs Amador Central Railroad Company, The Arcata and Mad River Rail Road Com-
[fol. 1478] pany, Butte, Anaconda & Pacific Railway Company, California Western Railroad, Camas Prairie Railroad Company, Camino, Placerville & Lake Tahoe Railroad Company, Central California Traction Company, The Colorado and Wyoming Railway Company, Gulf, Colorado and Santa Fe Railway Company, Holton Inter-Urban Railway Company, Inter-California Rail-

way Company, Klamath Northern Railway Company, Longview, Portland & Northern Railway Company, Magma Arizona Railroad Company, McCloud River Railroad Company, Modesto and Empire Traction Company, Nacozari Rail Road Company, Nevada Northern Railway Company, Northwestern Pacific Railroad Company, Oregon, California & Eastern Railway Company, Oregon Electric Railway Company, Oregon Pacific and Eastern Railway Company, Oregon Trunk Railway, Pacific Coast R.R. Co., Pacific Electric Railway Company, Panhandle and Santa Fe Railway Company, Petaluma and Santa Rosa Railroad Company, Portland Traction Company, Sacramento Northern Railway, Salt Lake, Garfield and Western Railway Company, San Diego & Arizona Eastern Railway Company, Sierra Railroad Company, Spokane International Railroad Company, Spokane, Portland and Seattle Railway Company, Stockton Terminal and Eastern Railroad, Sunset Railway Company, Tidewater Southern Railway Company, Tijuana and Tecate Railway Company, Tooele Valley Railway Company, Tucson, Cornelia and Gila Bend Railroad Company, Utah Railway Company, Visalia Electric Railroad Company, Walla Walla Valley Railway Company, Yakima Valley Transportation Co., and Yreka Western Railroad Company.

Intervening plaintiff St. Louis-San Francisco Railway Company.

(b) If the aforesaid Order of the Interstate Com- [fol. 1479] merce Commission dated December 31, 1963, is not permanently enjoined, set aside, annulled or suspended by this Court upon final hearing and determination of this action:

(i) The Order of the Interstate Commerce Commission dated December 31, 1963, is deemed to be effective for all purposes as of and from March 30, 1964.

(ii) Where the divisions presently in effect on transcontinental freight shipments produce revenues for any railroad subject to the Commission's Order which are in excess of the revenues that would have been produced by the divisions prescribed in and by the Order of the Commission dated December 31, 1963, such net differences constitute an indebtedness of each such railroad. Each of the applicants for the Interlocutory Injunction shall resettle with all railroads covered by the Commission's Order, whether or not parties to this action, on the basis of the divisions prescribed by the Commission in its aforesaid Order. In addition to any other right of set off, any such indebtedness may be set off by the creditor railroad against any balance it may have on hand which would otherwise be payable to the debtor carrier on account of interline settlements.

(iii) To compensate for damages that any railroad would incur as a result of the issuance of this Interlocutory Injunction because of the loss of the use of money, each applicant for the Interlocutory Injunction shall pay interest from the accounting monthly settlement dates prescribed by the Railway Accounting Rules at a rate or rates to be fixed by the Court [fol. 1480] at the time of the determination of such indebtedness of each such applicant, and this Court reserves jurisdiction to determine said rate or rates and the total amount of said interest and to order its payment.

(iv) Applicants for the Interlocutory Injunction shall reimburse all intervening defendants for additional accounting expenses, if any, and any other damages incurred as a result of this Interlocutory Injunction.

(v) In the event the Chicago, Milwaukee, St. Paul & Pacific Railroad Company should refuse to resettle

with interest the divisions in which it participates as a railroad operating in Mountain-Pacific territory, payment by applicants for the Interlocutory Injunction of the debts and damages to which the Chicago, Milwaukee, St. Paul & Pacific Railroad Company would otherwise be entitled as a railroad operating in the Midwest or East shall be subject to further order of this Court.

3. If the aforesaid Order of the Commission dated December 31, 1963, is not permanently enjoined, set aside, annulled or suspended as to any part or parts thereof in this action by this Court, then the provisions of paragraph 2 shall be applicable as between the Applicants for the Interlocutory Injunction and any railroad subject to the Commission's Order, but only to the extent that any such Applicant or railroad is affected by such part or parts of said Order as are not so permanently enjoined, set aside, annulled or suspended by this Court.

4. Nothing in this Order shall preclude any party from [fol. 1481] making application to this Court at any time for such modification of this Order as may be required in light of any change in conditions or other good cause shown.

5. This Court reserves jurisdiction of the within matter for all purposes to make any and all further proper orders in the circumstances.

6. This judgment for interlocutory injunction shall take effect upon the filing by plaintiffs herein of a bond in the sum of $50,000.00 as security for the payment of such costs and damages as may be incurred or suffered by any party as provided in Rule 65(c), Federal Rules of Civil Procedure.

7. This Judgment shall have no application to, or any effect upon, this Court's Judgment for Interlocutory Injunction made in this action under date of August 3, 1963,

and referring to the Commission's Order dated March 21, 1963, as amended by its Order dated June 20, 1963.

Dated: March 21, 1964.

Stanley N. Barnes, United States Circuit Judge;
Wm. C. Mathes, United States District Judge;
E. Avery Crary, United States District Judge.

[fol. 1482] Stipulation

Whereas, the question whether interlocutory relief should be granted with respect to the Order of the Interstate Commerce Commission dated December 31, 1963, was decided in principle on the record before the above-entitled Court at the hearing of July 11, 1963, and by the findings of fact, conclusions of law, and judgment entered by the above-entitled Court with respect to the order of said Commission dated March 21, 1963, as amended by the Order of said Commission dated June 20, 1963, and the parties hereto see no purpose in taking up the time of the Court for a hearing on a matter which has already been decided in principle;

Now, Therefore, It Is Stipulated and Agreed by and Between the Parties Hereto as Follows:

1. The application of plaintiffs and intervening plaintiffs for a judgment for interlocutory injunction on their respective supplemental complaint and amended complaint shall be deemed to have been submitted to the Court at a contested hearing and, based on the considerations above recited, it shall be deemed that the Court would have granted such application.

2. The foregoing judgment for interlocutory injunction on supplemental complaint and on amended complaint may be made and entered by the above-entitled Court without the filing of findings of fact or conclusions of law.

3. This stipulation and the making and entry of said foregoing judgment for interlocutory injunction, are and shall be without prejudice to the position of defendants

and intervening defendants that all of the above-mentioned orders of the Interstate Commerce Commission are in all [fol. 1483] respects valid, and shall not be held in any respect to curtail or limit their rights to support and maintain that position throughout this cause.

Dated: March 20, 1964.

O'Melveny & Myers, Homer I. Mitchell, Warren M. Christopher, Donald M. Wessling, 433 South Spring Street, Los Angeles 13, California;

Sidley, Austin, Burgess & Smith, Douglas F. Smith, Howard J. Trienens, George L. Saunders, Jr., 11 South LaSalle Street, Chicago 3, Illinois;

By Homer I. Mitchell, Attorneys for Plaintiffs and for Intervening Plaintiffs Amador Central Railroad Company, et al.

Gibson, Dunn & Crutcher, Dean C. Dunlavey, 634 South Spring Street, Los Angeles 14, California;

Ernest D. Grinnell, Jr., John E. McCullough, 906 Olive Street, St. Louis, Missouri;

By Dean C. Dunlavey, Attorneys for Intervening Plaintiff St. Louis-San Francisco Railway Co.

Richard E. Tuttle, Roderick B. Cassidy, J. Thompson Phelps, Cyril M. Saroyan, State Office Building, Civic Center, San Francisco 2, California;

By Cyril M. Saroyan, Attorneys for Intervening Plaintiffs The People of the State of California and The Public Utilities Commission of California.

[fol. 1484] Robert Y. Thornton, Lloyd G. Hammel, John F. Weisser, 103 Public Service Building, Salem, Oregon;

Joseph Besnah, Suite 305 California Federal Bldg., Inglewood, California;

By Joseph Besnah, Attorneys for Intervening Plaintiffs Arizona Corporation Commission, et al.

Francis C. Whelan, United States Post Office and Courthouse, Los Angeles 12, California;

By Francis C. Whelan, Attorney for Defendants The United States of America and Interstate Commerce Commission.

Joseph F. Eshelman, 3 Penn Center Plaza, Philadelphia 2, Pa.;

Thelen, Marrin, Johnson & Bridges, James W. Baldwin, 811 West Seventh Street, Los Angeles 17, California;

By Gordon Johnson, Attorneys for Intervening Defendants The Baltimore and Ohio Railroad Co., et al.

Winston, Strawn, Smith & Patterson, Bryce L. Hamilton, First National Bank Building, Chicago 3, Illinois;

Belnap, Spencer, Hardy & Freeman, Nuel D. Belnap, One North LaSalle Street, Suite 330, Chicago 2, Illinois;

Nye F. Morehouse, c/o Chicago & North Western Ry. Co., 400 West Madison Street, Chicago 6, Illinois;

[fol. 1485] Newlin, Tackabury & Johnston, George W. Tackabury, Frank R. Johnston, 727 West Seventh Street, Los Angeles 17, California;

By Frank R. Johnston, Attorneys for Intervening Defendants Chicago & North Western Railway Co., et al.

Raymond K. Merrill, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 888 Union Station, 516 W. Jackson Blvd., Chicago 6, Illinois;

Welsh & Cummins, 1204 Statler Center, 900 Wilshire Blvd., Los Angeles 17, California;

By Louis M. Welsh, Attorneys for Intervening Defendant Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

[fol. 1486]

Bond No. J-6108885

NATIONAL SURETY CORPORATION

HOME OFFICE
SAN FRANCISCO

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION
Civil Action No. 63-745-EC

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, GREAT NORTHERN RAILWAY COMPANY, LOS ANGELES JUNCTION RAILWAY COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, SANTA MARIA VALLEY RAILWAY COMPANY, SOUTHERN PACIFIC COMPANY, TRONA RAILWAY COMPANY, UNION PACIFIC RAILROAD COMPANY, VENTURA COUNTY RAILWAY COMPANY, and THE WESTERN PACIFIC RAILROAD COMPANY, Plaintiffs,

vs.

UNITED STATES OF AMERICA, and
INTERSTATE COMMERCE COMMISSION, Defendants.

UNDERTAKING ON INTERLOCUTORY INJUNCTION—
Filed March 24, 1964

Whereas, the above-named Plaintiffs have commenced an action, and issued summons therein in the District Court of the United States for the Southern District of California, Central Division, against the above-named Defendants, and have applied for an interlocutory injunction in said action,

[File endorsement omitted]

against the said Defendants, enjoining and restraining them from the commission of certain acts, as in the supplemental complaint filed in the said action are more particularly set forth and described.

Now, Therefore, National Surety Corporation, a body corporate, duly incorporated under the laws of the State of New York, and duly licensed to transact a general surety business in the State of California, in consideration of the premises, and of the issuing of said interlocutory injunction undertakes in the sum of Fifty Thousand and no/100 Dollars ($50,000.00) as security for the payment of such costs and damages as may be incurred or suffered by any party as provided in Rule 65 (c), Federal Rules of Civil Procedure.

It Is Further Agreed by the Surety, that in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

[fol. 1487] Signed, Sealed, and dated this 19th day of March, 1964.

National Surety Corporation, Surety, Myron C. Higby, Attorney-in-Fact.

Examined and recommended for approval as provided in Rule 8.

Homer I. Mitchell, Attorney.

Approved this 24th day of March, 1964.

E. Avery Crary, Approved, United States District Judge.

State of California
County of Los Angeles

On this 19th day of March, in the year 1964, before me, M. S. Bybee, a Notary Public in and for said County and

State, personally appeared Myron C. Higby, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-Fact of the National Surety Corporation, and acknowledged to me that he subscribed the name of the National Surety Corporation thereto as principal, and his own name as Attorney-in-Fact. In Witness Whereof, I have hereto set my hand and affixed my official seal, at my office, in said County and State, the day and year in this certificate first above written.

M. S. Bybee, Notary Public in and for said County and State

My commission expires Jan. 14, 1968

[Official Seal]

[fol. 1488]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

ANSWER OF INTERVENING DEFENDANTS CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL., TO AMENDED COMPLAINT OF INTERVENING PLAINTIFF ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY—Filed March 27, 1964

Now come Chicago and North Western Railway Company, Chicago Great Western Railway Company, Chicago, Rock Island and Pacific Railroad Company, Green Bay and Western Railroad Company, Gulf, Mobile and Ohio Railroad Company, Illinois Central Railroad Company, Missouri Pacific Railroad Company, and Soo Line Railroad

[File endorsement omitted]

Company and file this their joint and several answer to the [fol. 1489] amended complaint of intervening plaintiff St. Louis-San Francisco Railway Company, and say:

I.

These defendants, in answer to Paragraph I of said amended complaint, admit the first and second sentences thereof, and are without knowledge or information sufficient to form a belief as to the truth of the third sentence thereof.

II.

These defendants, in answer to paragraph II of said amended complaint, admit the first sentence thereof; deny the second sentence thereof, except they admit that a copy of the supplemental report and order of December 31, 1963 are attached to the supplemental complaint of plaintiffs and intervening plaintiffs Amador Central Railroad Company, et al., and that some of the changes made by the order of December 31, 1963 were minor technical changes in the mechanics of the original order of March 21, 1963; deny the third sentence thereof, except they admit that in many respects the order of December 31, 1963 is essentially identical to the original order of March 21, 1963; and admit the fourth and fifth sentences thereof.

III.

These defendants deny paragraphs III and IV of said amended complaint.

IV.

These defendants, in answer to paragraph V of said amended complaint, deny all of the allegations thereof, except they (a) admit that the Commission on reconsideration [fol. 1490] disagreed with plaintiffs' contention that the amendments to the March 21, 1963 order made by the order of June 20, 1963 were unlawful, (b) admit that the Commission in its order of December 31, 1963 incorporated

many of the provisions of the March 21, 1963 order, as amended by the order of June 20, 1963, and (c) admit that the order of December 31, 1963 provided an effective date of March 30, 1964, but these defendants refer to and incorporate herein the report and order of March 21, 1963 (Exhibits A and B to plaintiffs' complaint), the order of June 20, 1963 (Exhibit D to plaintiffs' complaint), and the report and order of December 31, 1963 (Exhibits A, B and C to supplemental complaint of plaintiffs, et al.) for a complete and accurate statement of the matters and things provided in said reports and orders. Further answering said paragraph V, these defendants aver that the amendments made by the order of June 20, 1963 were merely clarifying amendments which related back to and became a part of the order of March 21, 1963, and that there was no requirement of law that an effective date be specified in the order of June 20, 1963.

V.

These defendants deny paragraph VI of said amended complaint.

VI.

These defendants, in answer to paragraph VII of said amended complaint, admit the allegations thereof, but refer to and incorporate herein the statements and findings of the Interstate Commerce Commission as set forth at pages 2-6, inclusive, of Exhibit A to the plaintiffs' complaint for a [fol. 1491] more complete description of the parties, issues and pleadings in the proceedings before said Commission.

VII.

These defendants admit paragraph VIII of said amended complaint.

VIII.

These defendants deny paragraphs IX-XII, inclusive, of said amended complaint.

IX.

Further answering said amended complaint, these defendants deny each and every allegation thereof not herein specifically admitted or otherwise specifically answered; deny that plaintiffs are entitled to the relief prayed for in said amended complaint, or any part thereof, or any relief whatsoever.

Wherefore, these defendants pray that said amended complaint be dismissed, and that they have and recover their costs and be given such other relief as shall be just and equitable.

Dated March 27, 1964.

Winston, Strawn, Smith & Patterson, Bryce L. Hamilton, 1400 First National Bank Building, Chicago 3, Illinois;

Belnap, Spencer, Hardy & Freeman, Nuel D. Belnap, Richard M. Freeman, One North LaSalle Street, Suite 330, Chicago 2, Illinois;

[fol. 1492] Nye F. Morehouse, c/o Chicago and North Western Ry. Co., 400 West Madison Street, Suite 826, Chicago 6, Illinois;

Newlin, Tackabury & Johnston, George W. Tackabury, Frank R. Johnston, 1100 Roosevelt Building, 727 West 7th Street, Los Angeles 17, California, By Frank R. Johnston, Attorneys for Intervening Defendants Chicago and North Western Railway Company, et al.

Of Counsel: Martin L. Cassell, 139 West Van Buren Street, Chicago 5, Illinois;

Robert H. Stahlheber, Missouri Pacific Bldg., St. Louis 3, Missouri.

[fol. 1493] Proof of Service by Mail (omitted in printing).

[fol. 1496]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

ANSWER OF INTERVENING DEFENDANTS CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL., TO SUPPLEMENTAL COMPLAINT OF PLAINTIFFS AND INTERVENING PLAINTIFFS AMADOR CENTRAL RAILROAD COMPANY, ET AL.—Filed March 27, 1964

Now come Chicago and North Western Railway Company, Chicago Great Western Railway Company, Chicago, Rock Island and Pacific Railroad Company, Green Bay and Western Railroad Company, Gulf, Mobile and Ohio Railroad Company, Illinois Central Railroad Company, Missouri Pacific Railroad Company, and Soo Line Railroad Company and file this their joint and several answer [fol. 1497] to the supplemental complaint of plaintiffs and of intervening plaintiffs Amador Central Railroad Company, et al., and say:

I.

These defendants, in answer to paragraph I of said supplemental complaint, admit the first and second sentences thereof, and are without knowledge or information sufficient to form a belief as to the truth of the third sentence thereof.

II.

These defendants, in answer to paragraph II of said supplemental complaint, admit the first and second sen-

[File endorsement omitted]

tences thereof; deny the third sentence thereof, except they admit that some of the changes made by the order of December 31, 1963 were minor technical changes in the mechanics of the original order of March 21, 1963; deny the fourth sentence thereof, except they admit that in many respects the order of December 31, 1963 is essentially identical to the original order of March 21, 1963; and admit the fifth and sixth sentences thereof.

III.

These defendants deny paragraphs III and IV of said supplemental complaint.

IV.

These defendants, in answer to paragraph V of said supplemental complaint, deny all of the allegations thereof, except they (a) admit that the Commission on reconsideration disagreed with plaintiffs' contention that the amendments to the March 21, 1963 order made by the order of [fol. 1498] June 20, 1963 were unlawful, (b) admit that the Commission in its order of December 31, 1963 incorporated many of the provisions of the March 21, 1963 order, as amended by the order of June 20, 1963, and (c) admit that the order of December 31, 1963 provided an effective date of March 30, 1964, but these defendants refer to and incorporate herein the report and order of March 21, 1963 (Exhibits A and B to plaintiffs' complaint), the order of June 20, 1963 (Exhibit D to plaintiffs' complaint), and the report and order of December 31, 1963 (Exhibits A, B and C to supplement complaint of plaintiffs et al.) for a complete and accurate statement of the matters and things provided in said reports and orders. Further answering said paragraph V, these defendants aver that the amendments made by the order of June 20, 1963 were merely clarifying amendments which related back to and became a part of the order of March 21, 1963, and that there was

no requirement of law that an effective date be specified in the order of June 20, 1963.

V.

These defendants deny paragraph VI of said supplemental complaint.

VI.

Further answering said supplemental complaint, these defendants deny each and every allegation thereof not herein specifically admitted or otherwise specifically answered; deny that plaintiffs are entitled to the relief prayed for in said supplemental complaint, or any part thereof, or any relief whatsoever.

Wherefore, these defendants pray that said supplemental [fol. 1499] complaint be dismissed, and that they have and recover their costs and be given such other relief in the premises as shall be just and equitable.

Dated March 27, 1964.

Winston, Strawn, Smith & Patterson, Bryce L. Hamilton, 1400 First National Bank Building, Chicago 3, Illinois;

Belnap, Spencer, Hardy & Freeman, Nuel D. Belnap, Richard M. Freeman, One North LaSalle Street, Suite 330, Chicago 2, Illinois;

Nye F. Morehouse, c/o Chicago and North Western Ry. Co., 400 West Madison Street, Suite 826, Chicago 6, Illinois;

Newlin, Tackabury & Johnston, George W. Tackabury, Frank R. Johnston, 1100 Roosevelt Building, 727 West 7th Street, Los Angeles 17, California,
By Frank R. Johnston,

Attorneys for Intervening Defendants Chicago and North Western Railway Company, et al.

Of Counsel:

Martin L. Cassell, 139 West Van Buren Street, Chicago 5, Illinois;

Robert H. Stahlheber, Missouri Pacific Bldg., St. Louis 3, Missouri.

[fol. 1500] Proof of Service by Mail (omitted in printing).

[fol. 1503]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

JOINT ANSWER OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION TO SUPPLEMENTAL COMPLAINT OF INTERVENING PLAINTIFFS THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF CALIFORNIA—Filed April 9, 1964

The United States of America and the Interstate Commerce Commission, defendants herein, answer the Supplemental complaint of Intervening Plaintiffs the People of the State of California and the Public Utilities Commission of California, as follows:

I.

Admit the allegations contained in paragraph I.

[File endorsement omitted]

II.

Admit the allegations contained in paragraph II but refer to the Supplemental Report and Orders of the Commission for a true, complete and accurate statement of their contents.

[fol. 1504]

III.

Answering the allegations contained in paragraph III, admit only that certain complaints attacking the orders of the Commission in Docket No. 31503 are pending in this Court.

IV.

Answering the allegations contained in paragraph IV admit that all parties have stipulated to the entry of a preliminary injunction and that the Court entered such an injunction herein on March 24, 1964.

V.

For further answer to the allegations contained in the complaint, defendants deny that the orders of the Commission challenged herein are unlawful for the reasons specified or for any other reason whatsoever. Defendants aver that said orders are fully supported and justified by the findings and the evidence and are valid in all respects.

Wherefore, defendants pray that the relief sought in the complaint be denied, and that the complaint be dismissed with costs.

William H. Orrick, Jr., Assistant Attorney General;

Francis C. Whelan, United States Attorney, Los Angeles, California;

John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C.;

Attorneys for the United States of America.

Robert W. Ginnane, General Counsel;

Arthur J. Cerra, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.;

Attorneys for the Interstate Commerce Commission.

Certificate of Service (omitted in printing).

[fol. 1507]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

JOINT ANSWER OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION TO SUPPLEMENTAL COMPLAINT OF PLAINTIFFS AND INTERVENING PLAINTIFFS AMADOR CENTRAL R.R. Co., ET AL.—Filed April 9, 1964

The United States of America and the Interstate Commerce Commission, defendants herein, answer the Supplemental Complaint of Plaintiffs and of Intervening Plaintiffs Amador Central Railroad Company, et al., as follows:

I.

Admit the allegations contained in paragraph I.

[fol. 1508]

II.

Admit the allegations contained in paragraph II but refer to the Supplemental Report and Orders of the Commission for a true, complete and accurate statement of their contents.

[File endorsement omitted]

III.

Deny the allegations contained in paragraphs III and IV.

IV.

Admit all the allegations contained in paragraph V except deny that the order of June 20, 1963, is unlawful for the reason stated or any other reason whatsoever.

V.

Admit the allegations contained in paragraph VI.

VI.

For further answer to the allegations contained in the complaint, defendants deny that the orders of the Commission challenged herein are unlawful for the reasons specified or for any other reason whatsoever. Defendants aver that said orders are fully supported and justified by the findings and the evidence and are valid in all respects.

Wherefore, defendants pray that the relief sought in the complaint be denied, and that the complaint be dismissed with costs.

William H. Orrick, Jr., Assistant Attorney General;

Francis C. Whelan, United States Attorney, Los Angeles, California;

John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C.;

Attorneys for the United States of America.

Robert W. Ginnane, General Counsel;

Arthur J. Cerra, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.;

Attorneys for the Interstate Commerce Commission.

Certificate of Service (omitted in printing).

[fol. 1511]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

JOINT ANSWER OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION TO AMENDED COMPLAINT OF INTERVENING PLAINTIFF ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY—Filed April 9, 1964

The United States of America and the Interstate Commerce Commission, defendants herein, answer the Amended Complaint of Intervening Plaintiff St. Louis-San Francisco Railway Company as follows:

I.

Admit the allegations contained in paragraph I.

II.

Admit the allegations contained in paragraph II but refer to the Supplemental Report and Orders of the Commission for a true, complete and accurate statement of their contents.

[fol. 1512]

III.

Deny the allegations contained in paragraphs III and IV.

IV.

Admit all the allegations contained in paragraph V except deny that the order of June 20, 1963, is unlawful for the reason stated or any other reason whatsoever.

[File endorsement omitted]

V.

Answering the allegations contained in paragraph VI, admit only that the interlocutory injunction now in effect as to the Commission's order of March 21, 1963, as clarified by order of June 20, 1963, has been amended to apply to the order of December 31, 1963 by reason of the unanimous stipulation of all parties agreeing thereto.

VI.

Answering the allegations contained in paragraph VII, which adopts by reference paragraph IX of plaintiffs' complaint, and states an additional allegation thereto, defendants refer to and incorporate as though fully rewritten, paragraph V of the answer of defendants to plaintiffs' complaint; and admit that the intervening plaintiff (St. L-SF Ry. Co.) was one of the "Midwestern lines" which filed a separate complaint docketed by the Commission as No. 31503 (Sub-No. 1).

VII.

Answering the allegations contained in paragraph VIII, insofar as it adopts by reference the allegations of paragraph XIII of plaintiffs' complaint, defendants refer to and incorporate as though fully rewritten, paragraph IX of the answer of defendants to plaintiffs' complaint; and admit the remaining allegations contained in paragraph VIII.

[fol. 1513]

VIII.

Deny the allegations contained in paragraphs IX, X, XI and II.

IX.

For further answer to the allegations contained in the complaint, defendants deny that the orders of the Commission challenged herein are unlawful for the reasons specified or for any other reason whatsoever, and aver that said

orders are fully supported and justified by the findings and the evidence and are valid in all respects.

Wherefore, defendants pray that the relief sought in the complaint be denied, and that the complaint be dismissed with costs.

William H. Orrick, Jr., Assistant Attorney General;

Francis C. Whelan, United States Attorney, Los Angeles, California;

John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C.;

Attorneys for the United States of America.

Robert W. Ginnane, General Counsel;

Arthur J. Cerra, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.;

Attorneys for the Interstate Commerce Commission.

Certificate of Service (omitted in printing).

[fol. 1516]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

ORDER GRANTING MOTION OF MISSOURI-KANSAS-TEXAS RAILROAD COMPANY FOR LEAVE TO INTERVENE AS A PLAINTIFF—April 13, 1964

This cause having come on for hearing on the motion of Missouri-Kansas-Texas Railroad Company for leave to

[File endorsement omitted]

intervene as plaintiff and to file its complaint in this action, and it appearing to the Court that said movant was a party in interest to the proceedings before the Interstate Commerce Commission in which the orders under attack in this action were entered, and having a statutory right to intervene in this action,

It Is Ordered that the above-named movant be, and it is hereby granted leave to intervene in this action as a party plaintiff, to file its complaint in this action in the form attached to its motion for leave to intervene and to [fol. 1517] participate in this action as a party.

Dated: April 13, 1964.

E. Avery Crary, United States District Judge.

[fol. 1518]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

COMPLAINT OF MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, INTERVENING PLAINTIFF, TO ENJOIN, SET ASIDE, ANNUL AND SUSPEND ORDERS OF THE INTERSTATE COMMERCE COMMISSION—Filed April 13, 1964

Comes Now Missouri-Kansas-Texas Railroad Company, intervening plaintiff in the above-entitled and numbered cause, and for statement of its claim against defendants, alleges:

[File endorsement omitted]

I

Intervening plaintiff adopts by reference the matters alleged in paragraph 1 of the complaint filed by plaintiffs in this case.

II

Intervening plaintiff Missouri-Kansas-Texas Railroad Company is a common carrier by railroad, engaged in the transportation of property and persons for hire and is [fol. 1519] subject to the Interstate Commerce Act (49 U.S.C. § 1 et seq.) in respect of its interstate operations. Missouri-Kansas-Texas Railroad Company is a corporation organized under the laws of the State of Delaware, having a corporate office in the City of Wilmington, Delaware, and its principal office in the City of Dallas, Texas, and operating lines of railroad in the States of Missouri, Kansas, Oklahoma and Texas.

III

Intervening plaintiff adopts by reference paragraphs III through VIII, X through XII, XIV, XVI, XVIII and XIX of the complaint filed by plaintiffs in this cause.

IV

Intervening plaintiff adopts by reference paragraph IX of the complaint of plaintiffs filed in this cause but states in addition thereto that the intervening plaintiff was one of the "midwestern lines" which filed a separate complaint docketed by the Interstate Commerce Commission as No. 31503 (Sub No. 1) referred to in said paragraph IX.

V

Intervening plaintiff adopts the allegations of paragraph XIII of the complaint filed by plaintiffs in this cause with respect to dates upon which said plaintiffs filed their request with the Interstate Commerce Commission for the

extension of the period for filing petitions for reargument and reconsideration by the Commission of its order dated March 21, 1963, and further alleges that on May 16, 1963, intervening plaintiff, in replying to the petition for modification of effective date filed with the Commission on April 26, 1963, indicated that it desired to join in seeking the postponement of the effective date of the order of the Commission dated March 21, 1963. By the order of the Commission dated June 20, 1963, a copy of which is attached to the complaint in this cause as Exhibit D, the Commission denied the petition of intervening plaintiff for postponement of the effective date of the order of the [fol. 1520] Commission dated March 21, 1963.

VI

The order of the Interstate Commerce Commission dated March 21, 1963, as amended on June 20, 1963, to make effective on and after July 1, 1963, new bases of divisions on transcontinental traffic is, as it applies to intervening plaintiff, unlawful and in violation of the Interstate Commerce Act (49 U.S.C. § 1 et seq), the Administrative Procedure Act (5 U.S.C. § 1001 et seq.), and the Due Process Clause of the Federal Constitution (Amendment V) for the following reasons:

(1) The Commission's orders as they apply to intervening plaintiff are not supported by adequate or substantial evidence and are contrary to the evidence.

(2) The Commission's orders are unlawful because they drastically reduce the divisional revenues of intervening plaintiff without making any finding with respect to the amount of annual revenues of intervening plaintiff which the orders would transfer from intervening plaintiff to other carriers, without containing any finding that such a transfer is necessary to meet any specified proportion of the revenue needs of the carriers that would receive the increased divisions, and without any finding that such a

transfer will not unduly impair intervening plaintiff's ability to meet its needs for revenue.

(3) The action of the Commission in failing to postpone the effective date of its orders until after all proceedings before it were completed is arbitrary and capricious and constitutes a failure by the Commission to accord intervening plaintiff the full hearing to which it is entitled under the Interstate Commerce Act, the Administrative Procedure Act, and the Due Process Clause of the Fifth Amendment of the Federal Constitution.

(4) The division prescribed by said orders will not yield to Katy its operating expenses chargeable to the service [fol. 1521] covered by said divisions, plus taxes and a reasonable return on property value fairly attributable to such service.

(5) Said orders deprive Katy of its property without due process of law and take its property for public use without just compensation.

VII

The Commission threatens to enforce its order dated March 21, 1963, as amended on June 20, 1963, requiring that new bases of divisions be applied on and after July 1, 1963, and said orders will, if enforced, cause immediate and irreparable injury to intervening plaintiff. As specific grounds for continuance of the interlocutory injunction granted plaintiffs in this cause on August 3, 1963, pending final hearing and determination of this action, intervening plaintiff alleges, in addition to the facts heretofore set forth, that:

(1) If intervening plaintiff refuses to comply with said order, such refusal will constitute a violation of Section 16(8) of the Interstate Commerce Act and such refusal may subject intervening plaintiff to statutory penalties of $5,000 for each offense, each day of such refusal being deemed a separate offense, and such refusal will expose

intervening plaintiff to an action by the United States for the recovery of such penalties;

(2) If intervening plaintiff is required to comply with said orders, it will suffer immediate and substantial loss of revenues which it now receives as its share of the revenues from transcontinental traffic;

(3) Intervening plaintiff is without any administrative remedy inasmuch as few of the transcontinental shipments move on rates which were "established pursuant to a finding and Order of the Commission" within the meaning of Section 15(6) of the Interstate Commerce Act and are thus not subject to the Commission's power to require retroactive adjustment of divisions;

[fol. 1522] (4) Intervening plaintiff alleges that by reason of all of the foregoing it is without any plain or adequate remedy at law as a multiplicity of actions would be required to recover divisions under present agreements with the Transcontinental and Eastern carriers;

(5) If intervening plaintiff is required to comply with said orders, it would be required to make a double changeover in its accounting system and duplicate accounting would be necessitated thereby; first, by being required to change the method of dividing transcontinental revenues to the bases prescribed by said orders; and, second, by changing back to the present bases of divisions if said orders are permanently enjoined as prayed in this cause. Each change in accounting methods requires a reorganization of accounting procedures, thus causing a substantial disruption in intervening plaintiff's normal accounting operations and the needless expenditures of large sums of money;

(6) No injury will be sustained by defendants or by the public through continuance of the interlocutory injunction granted plaintiffs in this cause on August 3, 1963, pending final disposition of this proceeding.

VIII

Intervening plaintiffs Missouri-Kansas-Texas Railroad Company and St. Louis-San Francisco Railway Company filed with the Commission the following timely petitions:

(a) Petition for Modification and Reconsideration of the Commission's Findings, Report and Order of March 21, 1963, as amended on June 20, 1963;

(b) Petition for Leave to File Petition for Rehearing and Further Hearing;

(c) Petition for Rehearing and Further Hearing.

A copy of said Petition for Modification and Reconsideration is attached as Exhibit A to the Amended Complaint of [fol. 1523] Intervening Plaintiff St. Louis-San Francisco Railway Company, which by reference is made a part hereof.

A copy of said Petition for Leave to File and said Petition for Rehearing and Further Hearing is attached hereto, marked Exhibit A, and made a part hereof.

In said Petition for Modification and Reconsideration and in said Petition for Rehearing and Further Hearing, said intervening plaintiffs advised the Commission that, if its said order of March 21, 1963, as amended on June 20, 1963, should become effective, they would produce a net loss in excess of $423,000 annually to intervening plaintiff St. Louis-San Francisco Railway Company, and a net loss in excess of $132,000 annually to intervening plaintiff Missouri-Kansas-Texas Railroad Company, which was 95% of its net income of $139,202 in the year 1961, $119,714 more than its net income of $12,336 in the year 1962, and $116,433 more than its net income of $15,567 in the year 1963. In said Petition for Rehearing and Further Hearing, said intervening plaintiffs requested the Commission to grant them a rehearing and further hearing so that the foregoing evidence, and other evidence as set forth in said petition, might be presented to the Commission. In its order of

December 31, 1963, said Commission denied said Petition for Modification and Reconsideration, granted said Petition for Leave to File, and denied said Petition for Rehearing and Further Hearing.

Said intervening plaintiffs will suffer said losses, respectively, if said orders of March 21, 1963, June 20, 1963, and December 31, 1963, including its Notice to the Parties dated February 4, 1964, become effective.

IX

On January 22, 1964, the Interstate Commerce Commission served its supplemental report and order in Docket No. 31503, dated December 31, 1963, in which it undertook to deal with and dispose of all petitions pending before it. [fol. 1524] On February 7, 1964, the Commission served a Notice to the Parties in said Docket Number dated February 4, 1964, making certain corrections of a minor nature in the Supplemental Report and Order of December 31, 1963. A copy of said Notice to the Parties is attached as Exhibit C to the supplemental complaint of plaintiffs, and by reference is made a part hereof. The effect of this supplemental report and order was, except for minor technical changes made in the mechanics of its original order, to deny all requests for reconsideration and modification of the Commission's previous action. The supplemental order is essentially identical to the original order of March 21, 1963, as amended on June 20, 1963, and for the most part, the grounds set forth to justify those orders in the supplemental report are essentially the same as those relied upon in the original report, as amended.

X

The Commission's supplemental report and order of December 31, 1963, including its said Notice to the Parties dated February 4, 1964, are unlawful for the same reasons that its order of March 21, 1963, as amended, is unlawful, as set forth in paragraph VI of this intervening complaint,

the allegations of which are hereby adopted; and said supplemental report, order and notice are unlawful for the same reasons and upon the same grounds as the original report and order of March 21, 1963, as amended on June 20, 1963, are unlawful, as set forth in paragraphs III through VIII, X through XII, XIV, XVI, XVIII and XIX of plaintiff's complaint in this cause, which paragraphs are incorporated herein and adopted by intervening plaintiff as also applicable to said supplemental report and order of December 31, 1963, including said Notice to the Parties dated February 4, 1964.

XI

The Commission threatens to enforce said order of December 31, 1963, including said Notice to the Parties dated February 4, 1964, which, under its terms, is to become effective March 30, 1964. Said order requires that the new bases of divisions be applied on and after July 1, 1963, [fol. 1525] and said order will, if enforced, cause immediate and irreparable injury to intervening plaintiff for each and all of the reasons set forth in paragraph VII of this intervening complaint, the allegations of which are hereby adopted.

Wherefore, intervening plaintiff prays:

1. That the interlocutory injunction granted to plaintiffs on August 3, 1963, be amended so that the operation, enforcement and execution of said order of December 31, 1963, including said Notice to the Parties dated February 4, 1964, as well as said order of March 21, 1963, as amended on June 20, 1963, shall be enjoined pending final hearing and determination of this action.

2. That upon full hearing, the operation, enforcement and execution of said orders of March 21, 1963, June 20, 1963, and December 31, 1963, including said Notice to the Parties dated February 4, 1964, be perpetually enjoined and permanently set aside, annulled and suspended.

3. That intervening plaintiff recover its proper costs.

4. That intervening plaintiff have such other and further relief in the premises as in equity may be deemed meet and just by this honorable Court.

W. A. Thie, M. E. Clinton, John E. McCullough, Dean C. Dunlavey, Gibson, Dunn & Crutcher;

By Dean C. Dunlavey, Attorneys for Intervening Plaintiff.

[fol. 1526] *Duly sworn to by John P. Ganly, jurat omitted in printing.*

[fol. 1527] Proof of Service by Mail (omitted in printing).

[fol. 1529]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

STIPULATION AND ORDER GRANTING LEAVE TO FILE SUPPLEMENTAL COMPLAINT OF INTERVENING PLAINTIFFS, THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF CALIFORNIA, AND FIXING TIME FOR PLEADING THERETO—April 20, 1964

Intervening plaintiffs, the People of the State of California, and the Public Utilities Commission of California, having heretofore served upon all parties their Supplemental Complaint to enjoin, set aside, annul, and suspend order of the Interstate Commerce Commission,

[File endorsement omitted]

Now, Therefore, It Is Hereby Ordered:

1. That leave to file said Supplemental Complaint is hereby granted.

[fol. 1530] 2. That defendants and intervening defendants shall have 30 days from the date of this order within which to plead to said Supplemental Complaint.

Dated: April 20, 1964.

E. Avery Crary, Judge.

STIPULATION

It Is Hereby Stipulated and Agreed by and between the parties hereto that the foregoing Order may be made and entered by the above-entitled Court.

Dated: April 17, 1964.

Richard E. Tuttle, Roderick B. Cassidy, J. Thomason Phelps, Cyril M. Saroyan, State Office Building, Civic Center, San Francisco 2, California, By Cyril M. Saroyan, Attorneys for Intervening Plaintiffs The People of the State of California and The Public Utilities Commission of California;

O'Melveny & Myers, Homer I. Mitchell, Warren M. Christopher, Donald M. Wessling, 433 South Spring Street, Los Angeles 13, California;

[fol. 1531] Sidley, Austin, Burgess & Smith, Douglas F. Smith, Howard J. Trienens, George L. Saunders, Jr., 11 South LaSalle Street, Chicago 3, Illinois, By Homer I. Mitchell, Attorneys for Plaintiffs and for Intervening Plaintiffs Amador Central Railroad Company, et al.;

Gibson, Dunn, & Crutcher, Dean C. Dunlavey, 634 South Spring Street, Los Angeles 14, California;

Ernest D. Grinnell, Jr., John E. McCullough, 906 Olive Street, St. Louis, Missouri, By Dean C.

Dunlavey, Attorneys for Intervening Plaintiff St. Louis-San Francisco Railway Co.;

Robert Y. Thornton, Lloyd G. Hammel, John F. Weisser, 103 Public Service Building, Salem, Oregon;

Joseph Besnah, Suite 305 California Federal Bldg., Inglewood, California, By Joseph Besnah, Attorneys for Intervening Plaintiffs Arizona Corporation Commission, et al.;

Francis C. Whelan, United States Post Office and Courthouse, Los Angeles 12, California, By Francis C. Whelan, Attorney for Defendants The United States of America and Interstate Commerce Commission;

Joseph F. Eshelman, 3 Penn Center Plaza, Philadelphia 2, Pa.;

[fol. 1532] Thelen, Marrin, Johnson & Bridges, James W. Baldwin, 811 West Seventh Street, Los Angeles 17, California, By James W. Baldwin, Attorneys for Intervening Defendants The Baltimore and Ohio Railroad Co., et al.;

Winston, Strawn, Smith & Patterson, Bryce L. Hamilton, First National Bank Building, Chicago 3, Illinois;

Belnap, Spencer, Hardy & Freeman, Nuel D. Belnap, One North LaSalle Street, Suite 330, Chicago 2, Illinois;

Nye F. Morehouse, c/o Chicago & North Western Ry. Co., 400 West Madison Street, Chicago 6, Illinois;

Newlin, Tackabury & Johnson, George W. Tackabury, Frank R. Johnston, 727 West Seventh Street, Los Angeles 17, California, By Frank R. Johnston, Attorneys for Intervening Defendants Chicago & North Western Railway Co., et al.;

Raymond K. Merrill, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 888 Union Station, 516 W. Jackson Blvd., Chicago 6, Illinois;

Welsh & Cummins, 1204 Statler Center, 900 Wilshire Blvd., Los Angeles 17, California, By Louis M. Welsh, Attorneys for Intervening Defendant Chicago, Wilwaukee, St. Paul & Pacific Railroad Company.

[fol. 1533]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

STIPULATION AND ORDER GRANTING LEAVE TO FILE SUPPLEMENTAL COMPLAINT OF INTERVENING PLAINTIFFS, ARIZONA CORPORATION COMMISSION, ET AL.—April 20, 1964

Intervening Plaintiffs, Arizona Corporation Commission, Public Utilities Commission of Colorado, Public Utilities Commission of Idaho, Board of Railroad Commissioners of Montana, Public Service Commission of Nevada, State Corporation Commission of New Mexico, Public Utility Commissioner of Oregon, Public Service Commission of Utah and Washington Utilities and Transportation Commission, having heretofore served upon all parties a Supplemental [fol. 1534] Complaint to enjoin, set aside, annul and suspend that certain order of the Interstate Commerce Commission entered in ICC Docket No. 31503 and dated December 31, 1963,

[File endorsement omitted]

Now Therefore, It is Hereby Ordered:

1) That leave to file said Supplemental Complaint is hereby granted.

2) That defendants and intervening defendants have thirty days from the date of this order within which to plead to said Supplemental Complaint.

Dated: April 20, 1964.

E. Avery Crary, Judge.

STIPULATION

It Is Hereby Stipulated and Agreed by and between the parties hereto that the foregoing Order may be made and entered by the above-entitled Court.

Dated: April 17, 1964.

Robert Y. Thornton, Attorney General of Oregon;

Lloyd G. Hammel, Assistant Attorney General, Chief Counsel, Oregon PUC, By John F. Weisser, Assistant Attorney General of Oregon, Of Counsel for Intervening Plaintiffs 103 Public Service Building, Salem, Oregon 97310, Phone—Area Code 503 364-2171—Ext. 615;

[fol. 1535] Richard E. Tuttle, Roderick B. Cassidy, J. Thomason Phelps, Cyril M. Saroyan, State Office Building, Civic Center, San Francisco 2, California; By Cyril M. Saroyan, Attorneys for Intervening Plaintiffs The People of the State of California and The Public Utilities Commission of California;

O'Melveny & Myers, Homer I. Mitchell, Warren M. Christopher, Donald M. Wessling, 433 South Spring Street, Los Angeles 13, California;

Sidley, Austin, Burgess & Smith, Douglas F. Smith, Howard J. Trienens, Geordе L. Saunders, Jr.,

11 South LaSalle Street, Chicago 3, Illinois, By Homer I. Mitchell, Attorneys for Plaintiffs and for Intervening Plaintiffs Amador Central Railroad Company, et al.;

Gibson, Dunn & Crutcher, Dean C. Dunlavey, 634 South Spring Street, Los Angeles 14, California;

Ernest D. Grinnell, Jr., John E. McCullough, 906 Olive Street, St. Louis, Missouri, By Dean C. Dunlavey, Attorneys for Intervening Plaintiff St. Louis-San Francisco Railway Co.;

[fol. 1536] Francis C. Whelan, United States Post Office and Courthouse, Los Angeles 12, California, By Francis C. Whelan, Attorney for Defendants The United States of America and Interstate Commerce Commission;

Joseph F. Eshelman, 3 Penn Center Plaza, Philadelphia 2, Pa.;

Thelen, Marrin, Johnson & Bridges, James W. Baldwin, 811 West Seventh Street, Los Angeles 17, California, By James W. Baldwin, Attorneys for Intervening Defendants The Baltimore and Ohio Railroad Co., et al.;

Winston, Strawn, Smith & Patterson, Bryce L. Hamilton, First National Bank Building, Chicago 3, Illinois;

Belnap, Spencer, Hardy & Freeman, Nuel D. Belnap, One North LaSalle Street, Suite 330, Chicago 2, Illinois;

Nye F. Morehouse, c/o Chicago & North Western Ry. Co., 400 West Madison Street, Chicago 6, Illinois;

Newlin, Tackabury & Johnston, George W. Tackabury, Frank R. Johnston, 727 West Seventh Street, Los Angeles 17, California, By Frank R. Johnston, Attorneys for Intervening Defendants Chicago & North Western Ry. Co. et al.;

[fol. 1537] Raymond K. Merrill, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 888 Union Station, 516 W. Jackson Blvd., Chicago 6, Illinois;

Welsh & Cummins, 1204 Statler Center, 900 Wilshire Blvd., Los Angeles 17, California, By Louis M. Welsh, Attorneys for Intervening Defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

[fol. 1538]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Civil Action No. 63-745-EC

[Title omitted]

SUPPLEMENTAL COMPLAINT OF THE PEOPLE OF THE STATE OF CALIFORNIA, AND THE PUBLIC UTILITIES COMMISSION OF CALIFORNIA TO ENJOIN, SET ASIDE, ANNUL AND SUSPEND ORDER OF THE INTERSTATE COMMERCE COMMISSION—Filed April 20, 1964

Intervening plaintiffs, the People of the State of California, and the Public Utilities Commission of California, in addition to the matters already set forth in their original intervening complaint, make the following supplemental allegations in support of their claim against defendants:

1. On December 31, 1963, the Interstate Commerce Commission issued an order denying all pending petitions for [fol. 1539] reconsideration and modification of its Order of March 21, 1963, including the Petition for Reconsideration and Modification filed before the Commission by these intervener-plaintiffs.

[File endorsement omitted]

2. The reason given by the Commission for denying these petitions was its view that the proceedings had been resolved on proper grounds in the first place and there was consequently no occasion to make any changes.

3. The Mountain-Pacific railroads, these intervener-plaintiffs and others have complaints pending in this Court which attack the lawfulness of the basis for the March 21, 1963 order. Those complaints and the grounds set forth therein are equally applicable to the Order of December 31, 1963.

4. In order to prevent irreparable injury and guarantee an orderly disposition of the proceedings now pending in this Court, the Order of December 31, 1963 should be enjoined pending final hearing and determination of this action just as the Order of March 21, 1963 was previously enjoined.

Wherefore, intervener-plaintiffs pray:

1. That the operation, enforcement and execution of the Order of December 31, 1963 be enjoined pending the final hearing and determination of this action.

2. That the operation, enforcement and execution of the Order of December 31, 1963 be perpetually enjoined and permanently set aside, annulled and suspended.

3. That intervener-plaintiffs recover their proper costs.

[fol. 1540] 4. That intervener-plaintiffs have such other and further relief in the premises as in equity may be deemed meet and just by this Honorable Court.

Dated: March 24, 1964.

Richard E. Tuttle, Roderick B. Cassidy, J. Thomason Phelps, Cyril C. Saroyan, By Cyril C. Saroyan, Attorneys for Intervening Plaintiffs the People of the State of California, and the Public Utilities Commission of California.